

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
ET AL.,
Appellants,

—v.—

C. R. MANCARI, ET AL.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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RELEVANT DOCKET ENTRIES

DATE**PROCEEDINGS**

- 8-14-72 Filing Complaint.
Summons, original and six copies issued and with copies of complaint attached for service, delivered to the U.S. Marshal.
- 8-14-72 Filing Plaintiffs' Application for Convening Three-Judge Court.
- 8-15-72 Motion of C. R. Mancari, Edward Edwards and Anthony Franco for preliminary injunction.
Filing Affidavits of the following plaintiffs in support of above motion: Anthony Franco, Edward Edwards, C. R. Mancari.
- 8-15-72 Filing Plaintiffs' Points of Law and Authorities in support of their Motion for a Preliminary Injunction.
- 8-21-72 Filing U. S. Marshals Service of Summons on Louis Bruce, Commission of Indian Affairs; Rogers C. B. Morton, Sec. of Dept. of Interior; Richard G. Kleindienst, Attorney General of U.S.; and Victor R. Ortega, U. S. Attorney, on 8/15/72.
- 8-23-72 Filing U. S. Marshals Service of Summons on Walter Olson Area Director, BIA, on 8/22/72.
- 8-28-72 Filing Plaintiffs' Motion for Order granting leave to perform discovery.
- 8-25-72 Filing First Amended Complaint.
Original and six service copies of summons issued and delivered to the marshal for service with service copies of first amended complaint.
- 8-29-72 Filing and entering Order that plaintiffs be granted leave to issue and serve a notice of examination and to proceed thereunder to take testimony of Manny Foster, Jack Anderson and Carl G. McMullan. (Bratton)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8-29-72	<p>Notice of entry given by copy to counsel.</p> <p>Filing Notice to Take Depositions of Manny Foster, Jack Anderson, and Carl G. McMullen.</p>
8-29-72	Filing Marshal's returns of service showing the following persons served on 8-28-72: U. S. Attorney; Rogers C. B. Morton; Lewis Bruce (summons on first amended complaint)
8-31-72	Filing Plaintiffs Brief in Support of Application for a three-judge Court.
9- 1-72	Conference with counsel. Judge Bratton will notify counsel when three judges are designated.
9- 5-72	<p>Filing Marshal's return of service of summons and amended complaint on the following persons and dates:</p> <p>Walter O. Olson, Area Director, BIA-8/30/72</p> <p>Anthony Lincoln, Area Dr. BIA-8/30/72</p> <p>Navajo Area Office</p> <p>Anthony Lincoln, Navajo Area Director, BIA Window Rock, Ariz.-8/30/72</p> <p>Filing return of service on the following subpoenas D/T: Manny Foster, Mr. Carl G. McMullen, and Jack Anderson served 8/29/72.</p>
9- 5-72	Filing Defendants Preliminary Memorandum in Opposition to Motion for preliminary injunction.
9-15-72	<p>Filing and entering Order constituting a three-judge court as follows: Honorable Oliver Seth; Honorable Howard C. Bratton and Honorable Edwin L. Mechem. (Lewis)</p> <p>Copy of Order mailed to counsel as notice of entry; entire pleadings mailed to Judge Seth and given to Judge Mechem.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-25-72	Filing Plaintiffs' Request for Admissions of Defendants. Exhibits attached. Copies sent to all three Judges.
9-26-72	Case set for hearing before three judge court at Albuquerque on Thursday, Sept. 28, 1972, at 2:00 P.M. Counsel notified
9-25-72	Filing deposition of Jack Anderson. Filing deposition of Carl G. McMullan. Filing deposition of Mannie Foster.
9-26-72	Filing defendants' Motion to dismiss the First Amended Complaint. Copy given judges.
9-26-72	Filing Motion of Amerind to Intervene as Defendant. Copies given Judges. Filing Memorandum of Points and Authorities in support of applicant for intervention's motion to intervene. Copies given Judges. Filing applicant for intervention, Amerind's Motion to Dismiss. Copies given Judges. Filing Memorandum of Points and Authorities in Support of applicant for intervention's motion to dismiss plaintiffs' complaint and motion for preliminary injunction. Copies given Judges. Filing Certificate of service by applicant for intervention.
10-10-72	Filing the following subpoenas: Mr. John Carver served 9/27/72 Walter O. Olson 9/28/72
9-27-72	Filing Plaintiffs' Memorandum Brief in support of plaintiffs' motion for a preliminary injunction. Copies given to Judges.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-28-72	<p>Filing Plaintiffs' List of Exhibits.</p> <p>Copies given to Judges.</p>
9-28-72	<p>Filing Applicant for Intervention's Preliminary Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.</p> <p>Copies given to Judges.</p>
9-28-72	<p>Albuquerque/ 3 Judge Court of Seth, Bratton and Mechem/Wilkins, Reporter. At 2:05 P.M. Call for hearing on Application for Preliminary Injunction and Motions to Dismiss. Plaintiff's appearance by Mr. Kalikowski. Defendant's appearance by Mr. Ortega. Mr. Ortega moves the admission of Harris Sherman for this case, granted. The court hears Mr. Sherman on the Motion to Intervene by Amerind. Amerind is allowed to appear as amicus curiae with right to renew Motion to Intervene later. The courts hears the application for preliminary injunction and motions to dismiss and takes the same under advisement.</p> <p>Filing Plaintiff's exhibits 1-9.</p> <p>Filing Defendant's exhibits A-F.</p>
10-13-72	<p>Case set for final hearing on the merits Wednesday, November 29, 1972, at 9:00 o'clock A.M. Counsel notified by letter.</p>
10-16-72	<p>Filing and entering Order that plaintiffs motion for an order that this action be maintained as a class action is granted, and the class is designated as all non-Indian employees of the Bureau of Indian Affairs of the Department of Interior of the United States of America, and defendants are ordered to give notice to the members of the class by posting copies of notice on sufficient bulletin boards no later than November 1, 1972. (SETH, BRATTON & MECHEM) Copies sent to three Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-16-72	<p>Copies of above order sent to counsel as notice of entry.</p> <p>Filing and entering Order that the prayer for preliminary injunction is hereby DENIED. (SETH, BRATTON & MECHEM). Copies given to judges. Copies of order sent to counsel as notice of entry.</p>
10-20-72	<p>Filing Entry of Appearance and adoption of prior pleadings on behalf of applicant for Intervention Amerind, Inc., by James Wechsler, Alan R. Taradash, Richard B. Collins, Box 116, Crownpoint, N. M. Copies given to three Judges.</p>
10-30-72	<p>Filing Plaintiff's Request for Documentation.</p> <p>Copies given to Judges.</p>
11- 1-72	<p>Filing Statement of Maria B. Andronicos, Writer-Editor, Bureau of Indian Affairs.</p> <p>Copies given to Judges.</p>
11- 3-72	<p>Filing Statement of Carl B. Shaddox in support of plaintiffs' cause. Copies given to Judges.</p> <p>Filing Statement of William J. Fossey affirming his support for the plaintiffs.</p> <p>Copies given to Judges.</p>
11- 6-72	<p>Filing Statement of Eugene B. Malveney in support of plaintiffs' cause. Copies sent to Judges.</p> <p>Filing letter-statement of Myron E. Saltmarsh in support of plaintiffs. Copies sent to Judges.</p> <p>Filing letter-statement of Ty Burnett in support of plaintiffs. Copies sent to Judges.</p>
11- 6-72	<p>Filing letter from Jesse J. Billups and letter from John E. Taylor in support of plaintiff's cause Copies given to Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11- 7-72	Filing letter of Norris A. Thomson, Area Guidance Counselor, Muskogee Area Office supporting the class action suit filed by the plaintiffs. Copies sent to Judges.
11- 6-72	Filing letter of Frederick A. Goranson in support of plaintiffs suit.
11- 7-72	Filing letter from Lloyd W. England supporting plaintiffs' case. Copies of above letters sent to Judges.
11- 8-72	Filing letters from the following persons supporting the plaintiffs Complaint: Floyd Goss, Joseph D. Gray, Ivan (Dean) Krahulec, and Elmer B. Arrik. Copies sent to Judges.
11- 9-72	Filing letters from the following persons supporting the plaintiffs complaint: Goldia D. Ford and Virginia C. Rogers. Copies sent to the Judges.
11- 9-72	Filing Letter of Area Guidance Counselor, Muskogee Area Office supporting plaintiffs complaint. Copies sent to Judges.
11-13-72	Filing letter with twenty five (25) signatures of non-Indian employees supporting plaintiff's cause. From Sells Arizona.
11-10-72	Filing letter with fifteen signatures of Non-Indian employees supporting plaintiff's cause. Anadarko, Oklahoma.
11-13-72	Filing letter from Robert C. Nogler, National Representative, Eleventh District AFGE supporting plaintiff's cause.
Copies of above three letters sent to Judges.	

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-18-72	Filing Notice to Take Deposition of Mr. John Arkansas, Mr. Bob Caswell and Miss May Hall. Copies given Judges.
11-14-72	Filing letter from Joe B. Walker, Shawnee, Oklahoma in support of Plaintiff's complaint. Copies sent to Judges.
11-15-72	Filing Renewed motion to intervene by Amerind, with Points and Authorities cited and exhibit attached. Copies sent to Judges Copy of proposed order sent to Judge Seth with copy of motion.
11-20-72	Filing and entering Order that Amerind be permitted to intervene as a party defendant in this case. Order entered upon the oral concurrence of all Members of the Court. (Bratton) Copy of Order mailed to counsel as notice of entry; copy given Judge Mechem and Judge Seth.
11-20-72	Filing letter with four (4) signatures of Non-Indian employees supporting plaintiff's cause. Brigham City, Utah. Copies to Judges. Filing letter of Virginia B. Simons of Billings, Montana supporting Plaintiff's cause. Copies sent to Judges. Filing Letter of Mrs. Dorothy K. Degnan of Billings, Montana, supporting plaintiff's cause. Copies sent to Judges. Filing letter of Lawrence E. Hanline, Scottsdale, Arizona, non-support of plaintiff's cause. Copies sent to Judges.
11-21-72	Filing Defendant's Answer to First Amended Complaint. Filing letter of Dorothy L. Vail of Billings, Montana, a non-Indian employee supporting plaintiff's cause.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-22-72	Filing U. S. Marshals Service of Subpoena Duces Tecum directed to Mr. John Arkansas; Bob Caswell and Miss May Hall served 11/18/72.
11-24-72	Filing letter of John W. Steffen supporting plaintiff's cause.
	Filing letter of Robert Berryhill supporting plaintiffs' cause. (both the above letters with attachments)
	Copies mailed to the Judges.
11-24-72	Filing letter of Ned T. Robitzer supporting plaintiff's cause.
	Filing letter of Lillie B. Ratchford supporting plaintiff's cause.
	Filing letter of Lila N. Wendel, with attachments, supporting the plaintiff's cause.
11-27-72	Filing letter of Roy M. Johnson, with attachments, supporting the plaintiff's cause.
	Filing letter of Barbara Earl; Sherma J. Nay and Billie R. Holder, supporting the plaintiff's cause.
	Filing letter with four (4) signatures supporting plaintiff's cause.
	Filing letter with eight (8) signatures supporting plaintiff's cause.
	Filing letter of Kelse T. Kennedy supporting plaintiff's cause.
	Filing letter with twenty (20) signatures supporting pltf's cause.
	Filing letter of Local 268 National Federation of Federal Employees, supporting plaintiff's cause.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-27-72	<p>Filing letter of William H. Parcell, with attachment, supporting the plaintiff's cause.</p> <p>Filing letter of David Etheridge non-Indian Employee of BIA not in support of plaintiff's cause.</p> <p>Filing letter of C. Russell Coen, Jr., supporting in part and opposing in part of this cause.</p> <p>Copies of the above letters to the Judges.</p>
11-27-72	<p>Filing letter of John J. Brown supporting plaintiff's cause.</p> <p>Copies to the Judges.</p>
11-28-72	<p>Filing Supplemental Memorandum Brief. Copies given to Judge Seth and Judge Mechem.</p> <p>Filing letter signed by five (5) persons supporting plaintiff's cause.</p> <p>Filing letter of Mary Nagashima supporting plaintiff's cause.</p> <p>Filing letter of Mary Lou Rush stating Barrow Education Association employees voted ten (10) supporting plaintiff's cause and thirteen (13) do not support plaintiff's cause.</p> <p>Copies of these letters to the Judges.</p> <p>Filing list of Plaintiffs' Exhibits. Copies to the Judges.</p>
11-29-72	Filing Answer by Intervener. Copies to the Judges.
11-30-72	<p>Filing letter from Roy E. Kohen and one anonymous letter supporting Plaintiff's complaint.</p> <p>Filing letter from Virginia D. Elliott in support of plaintiff's complaint.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-29-72	<p>Albuquerque/ Judges Seth, Bratton & Mechem/ Dearnley reporter. 9:00 A.M. called for further hearing. Plaintiffs by Mr. Kulikowski, defendant, United States, by Mr. Ortega; intervenor by Mr. Sherman. Defendant and intervenor waive opening statements. Plaintiff present evidence. 12:04 plaintiffs rest. Defendants present no evidence. Intervenor desires continuance to have a witness appear, denied. Court directs deposition of witness Peter McDonald be filed within 10 days. If rebuttal is needed, plaintiffs to obtain the Court's permission. All briefs due in 20 days. 12:12 P.M. recess.</p>
11-29-72	<p>Filing Affidavit by defendant John O. Crow.</p> <p>Filing plaintiffs and defendants' exhibits. (in deposition envelope)</p>
11-30-72	<p>Filing letter with seven signatures supporting this action.</p>
12- 1-72	<p>Filing Marshal's return of service of subpoena on Mr. John Arkansas, Chief of Disbursement Section, B.I.A. on November 28, 1972.</p> <p>Filing Marshal's return of service of subpoena on Robert M. Pattersen, Executive Office, BIA, showing same unexecuted.</p> <p>Filing Marshal's return of service of subpoena on Jack Anderson, Asst. Supt. of Industrial Area, BIC, on November 24, 1972</p>
12- 4-72	<p>Filing letter from Lila N. Wendel, Office of Education Programs, Bureau of Indian Affairs, Brigham City, Utah in support of complaint. Copies to Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12- 4-72	<p>Filing letter responses from the following persons, BIA, Fairbanks, Alaska stating they do not wish to be included in the class action: Geraldine S. Evans, David L. Evans, Harold S. Kaveolook, and Jane K. George. Copies sent to Judges</p> <p>Filing letter response in support of plaintiff's complaint by Sue Prince, Venetie, Alaska. Copies sent to Judges.</p>
12- 7-72	<p>Filing letter statement in support of plaintiff's action signed by: Aldora A. Keller, LaDone Plowman, Bonnie Neil, Linda Stalnader, Glen D. Johnson, Evelyn Pohmagievich, Ferrin L. Allen, Ray Medina and Elizabeth M. Lawritzer from Fairbanks Agency, B.I.A. Copies sent to Judges.</p> <p>Filing letter from Wallace O. Craig, Fairbanks, Alaska stating he does not wish to be considered in this class action. Copies sent to Judges.</p>
12-11-72	<p>Filing letter from Henry Balliet, Education Program Administrator Bureau of Indian Affairs, New Town, North Dakota, supporting plaintiff's complaint. Copies sent to Judges.</p>
12-18-72	<p>Filing Depositions of Robert Caswell and Mae Hall and John Arkansas.</p>
12-19-72	<p>Filing Supplementary Memorandum Brief in behalf of Government Defendants. Copies given judges.</p> <p>Filing Plaintiffs' Final Trial Brief. Copies given judges.</p>
12-20-72	<p>Filing Plaintiff's Response to Intervener's Motion for Extension of Time. Copies given judges.</p>
12-21-72	<p>Filing letter, unsigned, supporting plaintiff's complaint. Copies to judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12-22-72	Filing unsigned letter supporting complaint. Copies sent to Judges.
12-19-72	Filing Intervenor's Motion for extension of time which to file Supplementary Memorandum. ORALLY DENIED (BRATTON) Copies sent to Judges.
12-27-72	Filing letter from Joseph Pipa, Chairman Prof. Rigsts and Responsibilities Comm., Barrow, Alaska. Filing letter from Richard B. Fairchild, President Barrow Education Association of Barrow, Alaska stating there were ten members who desired to be aligned with the plaintiff and considered members of the class action. Copies to Judges.
2-21-73	Copy of Federal Employees' News Digest from Ann Craig.
6- 1-73	Court's Memorandum Opinion. Judgment that the named defendants are permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian. (SETH, BRATTON AND MECHEM) Copies of Opinion and Judgment sent to counsel. Copies sent to three Judges.

FINAL DOCKET JS 6

- 6-18-73 Filing by Shelton M. Estes a petition that the defendants be declared in contempt of court and for a cease and desist order.

RELEVANT DOCKET ENTRIES

DATE**PROCEEDINGS**

6-18-73 Copies of petition sent to three Judges.

6-29-73 Defendants' Notice of Appeal. to the U.S. Supreme Court.

Copies of Notice of Appeal sent to all counsel, copy of notice with copy of entire docket entries to Clerk, U. S. Supreme Court, copy of notice to Court Reporter, copy of entire docket entries and form letter to counsel for Defendants.

6-29-73 Notice of Appeal by Intervenor-Appellant Amerind.

Copies of Notice of Appeal sent to all counsel, copy to Clerk, U.S. Supreme Court, copy of notice to reporter, copy of entire docket entries sent to counsel for Amerind.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Original Filed in My Office, Aug. 14, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

COMPLAINT

Plaintiffs complain and allege as follows:

I

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1346(a) (2) and Public Law 92-261, § 717(c) and § 706. This is a class action proceeding for a Preliminary and Permanent Injunction to enjoin the defendants from implementing and enforcing a certain Bureau of Indian Affairs new Indian preference policy, said policy being represented by Personnel Management Letter No. 72-12 issued by defendant Olson, a copy of which is attached hereto and incorporated herein as Exhibit A.

II

This is a proper case for determination by a Three-Judge Court pursuant to Title 28 USC § 2282 and § 2284 since plaintiffs seek to attach the constitutionality of

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certain Acts of Congress and the manner of administrative application of those Acts.

III

Plaintiffs bring this action as a class action on behalf of themselves and other similarly situated non-Indian employees of the Bureau of Indian Affairs pursuant to Rule 23A of the Federal Rules of Civil Procedure. Members of the class are so numerous that joinder of all members is impracticable. However, there are common questions of law and fact affecting the rights of non-Indian employees of the Bureau of Indian Affairs to continue in their employment free from discrimination based on national origin. The claims of the plaintiffs are typical of the claims of the class, and plaintiffs fairly and adequately protect the interests of the class.

IV

The new Indian preference policy being implemented by defendants proposed to extend Indian preference in employment to training and the filling of vacancies by original appointment, reinstatement and promotions.

V

Plaintiffs allege that the so-called "Indian Preference Statutes", Title 25 USC § 44, 46 and 472, are unconstitutional because they deprive plaintiffs of their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VI

The plaintiffs further allege that the so-called "Indian Preference Statutes" are being unconstitutionally applied to them under the new policy being implemented by defendants; and that said application denies plaintiffs their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VII

Plaintiffs further allege that the said new Indian preference policy grants powers to the defendants that are not provided for in the Indian Preference Statutes in that said statutes do not comprehend preferential treatment to Indians when agency personnel action is taken with regards to training, reinstatement and promotions.

VIII

Plaintiffs further allege that the new Indian preference policy being implemented by defendants is in direct conflict with and violates the rights of plaintiffs as federal employees, under the Civil Rights Acts of 1964 and 1972, said rights being guaranteed in Title 42 USC § 2000e-2 and Public Law 92-261, § 717.

IX

That the defendants will, unless enjoined by an appropriate order of this Court, continue to implement and enforce the new Indian preference policy. This implementation and enforcement has placed and will continue to place plaintiffs at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the plaintiffs to discrimination and deny them equal employment opportunity.

X

That the above-referenced discrimination and denials is causing and will continue to cause great and irreversible harm to the plaintiffs. It will also inhibit job performance of plaintiffs, destroy morale within the Agency, result in numerous resignations of non-Indians and ultimately lead to an overall weakening of the Agency's ability to perform its mission of serving the Indian people.

WHEREFORE, plaintiffs pray for appropriate preliminary injunction directed against defendants enjoining them from further implementing and enforcing the

said new Indian preference policy, and that the Court order a speedy hearing to determine whether said preliminary injunction will be entered;

Plaintiffs further pray the Court as follows:

1. That the preliminary injunction, if entered, be made permanent.

2. That the Court dispense with the necessity of plaintiffs' posting any security as normally called for by Rule 65(c) of the Federal Rules of Civil Procedure.

3. That the Court grant the plaintiffs' costs, reasonable attorney's fees, and such other, additional or alternative relief as appears to the Court to be equitable and just under the circumstances.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs

1300 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103
842-6111

EXHIBIT "A"

In Reply Refer to:

[SEAL]**UNITED STATES DEPARTMENT
OF THE INTERIOR****BUREAU OF INDIAN AFFAIRS****ALBUQUERQUE AREA OFFICE****P. O. Box 8327****Albuquerque, New Mexico 87108****[Jun. 28, 1972]****PERSONNEL MANAGEMENT LETTER NO. 72-12
(300, 335, 410)****Subject: Indian Preference**

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual re-

leases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Original Filed in my office, Aug. 15, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and
JULES COOPER, on behalf of themselves and all others
similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION

Upon the Complaint and the Affidavits of C. R. MANCARI, EDWARDS and ANTHONY FRANCO, annexed hereto, the plaintiffs move the Court as follows:

1. To issue a temporary injunction directed against the defendants, their agents and those under their executive control, to suspend and restrain the implementation, operation and enforcement of the new Indian preference policy of June 23, 1972, which is evidenced by a certain personnel management letter written by defendant OLSON and attached to plaintiff's Complaint as Exhibit A. The grounds for this Motion, as more fully set forth in the Complaint and the annexed Affidavits are that:

a. The Indian Preference Statutes upon which the defendants rely in implementing the new policy are unconstitutional or in the alternative are being unconstitutionally applied to the defendants.

b. The defendants, unless enjoined, will continue to implement and enforce the new policy.

c. The policy, its implementation and enforcement have

caused, are causing and will continue to cause great and irreparable harm to the plaintiffs by discriminating against them on the basis of national origin and denying them equal employment opportunities guaranteed them under the Civil Rights Acts of 1964 and 1972. The new policy being implemented and enforced by defendants is contrary to the so-called "Indian Preference Statutes" since those statutes do not comprehend Indian preference as to training, reinstatement and promotion.

d. Unless the implementation and enforcement of the new policy is restrained pending a final disposition of the action, the injury to the plaintiffs in the interim will be irreparable even if there is a final judgment for the plaintiffs.

e. No injury will be sustained by the defendants, by the Bureau of Indian Affairs, by the public or by the Indian people through issuance of a temporary injunction.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory Court of three judges, at least one of whom shall be a Circuit Judge, in accordance with the provisions of § 2284, Title 28, United States Code.

3. That the concurrence of opposing counsel to the entrance of such a preliminary injunction has been requested, but denied.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs
1800 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626 Civil

[Original Filed in my office, Aug. 25, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and
JULES COOPER, on behalf of themselves and all others
similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

FIRST AMENDED COMPLAINT

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, the plaintiffs file this First Amended Complaint and allege as follows:

I

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1346(a) (2) and Public Law 92-261, § 717(c) and § 706. This is a class action proceeding for a Preliminary and Permanent Injunction to enjoin the defendants from implementing and enforcing a certain Bureau of Indian Affairs new Indian preference policy, said policy being represented by Personnel Management Letter No. 72-12 issued by defendant Olson, a copy of which is attached hereto and incorporated herein as Exhibit A.

II

This is a proper case for determination by a Three-Judge Court pursuant to Title 28 USC § 2282 and § 2284

since plaintiffs seek to attack the constitutionality of certain Acts of Congress and the manner of administrative application of those Acts.

III

Plaintiffs bring this action as a class action on behalf of themselves and other similarly situated non-Indian employees of the Bureau of Indian Affairs pursuant to Rule 23A of the Federal Rules of Civil Procedure. Members of the class are so numerous that joinder of all members is impracticable. However, there are common questions of law and fact affecting the rights of non-Indian employees of the Bureau of Indian Affairs to continue in their employment free from discrimination based on national origin. The claims of the plaintiffs are typical of the claims of the class, and plaintiffs fairly and adequately protect the interests of the class.

IV

The new Indian preference policy being implemented by defendants proposed to extend Indian preference in employment to training and the filling of vacancies by original appointment, reinstatement and promotions.

V

Plaintiffs allege that the so-called "Indian Preference Statutes", Title 25 USC § 44-46, and 472, are unconstitutional because they deprive plaintiffs of their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VI

The plaintiffs further allege that the so-called "Indian Preference Statutes" are being unconstitutionally applied to them under the new policy being implemented by defendants; and that said application denies plaintiffs their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VII

Plaintiffs further allege that the said new Indian Preference policy grants powers to the defendants that are not provided for in the Indian Preference Statutes in that said statutes do not comprehend preferential treatment to Indians when agency personnel action is taken with regards to training, reinstatement and promotions.

VIII

Plaintiffs further allege that the new Indian preference policy being implemented by defendants is in direct conflict with and violates the rights of plaintiffs as federal employees, under the Civil Rights Acts of 1964 and 1972, said rights being guaranteed in Title 42 USC §2000e-2 and Public Law 92-261, § 717.

IX

That the defendants will, unless enjoined by an appropriate order of this Court, continue to implement and enforce the new Indian preference policy. This implementation and enforcement has placed and will continue to place plaintiffs at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the plaintiffs to discrimination and deny them equal employment opportunity.

X

That the above-referenced discrimination and denials is causing and will continue to cause great and irreversible harm to the plaintiffs. It will also inhibit job performance of plaintiffs, destroy morale within the Agency, result in numerous resignations of non-Indians and ultimately lead to an overall weakening of the Agency's ability to perform its mission of serving the Indian people.

WHEREFORE, plaintiffs pray for an appropriate preliminary injunction directed against the defendants enjoining them from the enforcement, operation or execution of the so-called Indian Preference Statutes, being Title

25 USC § 44 to 46 and 472; and in the alternative plaintiffs pray for an appropriate preliminary injunction directed against defendants enjoining them from further implementing and enforcing the said new Indian preference policy, and that the Court order a speedy hearing to determine whether one of the preliminary injunctions prayed for will be entered;

Plaintiffs further pray the Court as follows:

1. That the preliminary injunction, if entered, be made permanent.

2. That the Court dispense with the necessity of plaintiffs' posting any security as normally called for by Rule 65(c) of the Federal Rules of Civil Procedure.

3. That the Court grant the plaintiffs' costs, reasonable attorney's fees, and such other, additional or alternative relief as appears to the Court to be equitable and just under the circumstances.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs

1300 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103
842-6111

EXHIBIT "A"

In Reply Refer To

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-12
(300, 835, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE, has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised

Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

EXHIBIT "A"

[SEAL]

In Reply Refer To:
Personnel

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Field Support Services Office
500 Gold Avenue, S.W.
P.O. Box 2026
Albuquerque, New Mexico 87198

[Received Sept. 8, 1972, U.S. Attorneys Office,
Albuquerque, N. M.]

[Sep. 08, 1972]

Memorandum

To: Mr. Victor Ortega
U.S. District Attorney

From: Personnel Officer
Field Support Services Office

Subject: Additional Information Requested Concerning
Deposition
C. R. Mancari, et. al. vs Rogers C. B. Morton,
as Secretary of Interior et. al.

The vacancy that was created by Mr. Robert McKinley's resignation has been filled by an Indian candidate. Mr. Begay was selected as a result of utilizing the Applicant Supply File. As was told during the proceedings of the deposition on September 6, 1972, the position was not advertised. Mr. Begay was qualified and was an Indian candidate he, therefore, was given an Excepted Appointment as Program Analyst, GS-9. Management always has the prerogative of employing outside candidates rather than promoting [illegible] current workforce.

Since the announcement of the expanded Preference Policy was disseminated 22 Promotional Opportunity Bulletins have been issued. As a result, 17 certificates have been forwarded to operating officials or selecting offices for action. Selections have been made and 15 Indians were selected and two non-Indians have been selected.

No selections have been made on the remaining five certificates.

/s/ Carl G. McMullen
CARL G. McMULLEN
Personnel Officer, FSSO

EXHIBIT "B"**ALBUQUERQUE AREA OFFICE****PROMOTIONS FROM JUNE 26, 1972 TO SEPTEMBER 26, 1972**

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		4
	5		5
	6		6
	7		7
	8		8
	9		9
	10		10
	11		11
	12		12
	13		13
	14		14
	15		15
Total	18	Total	09

EXHIBIT C**ALBUQUERQUE AREA OFFICE****PROMOTIONS FROM JANUARY 1, 1972 TO JUNE 26, 1972**

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade.....	2	Wage Grade.....	0
General Schedule 2.....	0	General Schedule 2.....	0
3.....	3	3.....	0
4.....	3	4.....	1
5.....	0	5.....	1
6.....	0	6.....	0
7.....	2	7.....	4
8.....	0	8.....	0
9.....	1	9.....	4
10.....	0	10.....	0
11.....	0	11.....	7
12.....	0	12.....	0
13.....	0	13.....	0
14.....	0	14.....	0
15.....	0	15.....	0
Total	20	Total	17

EXHIBIT D

[SEAL]

In Reply Refer To:
Personnel Management
BCCO-3875

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Sep. 1, 1972]

Honorable Bob Packwood
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

We have received your inquiry on behalf of three of your constituents regarding the expanded policy granting preference to Indians in promotion in this Bureau.

We can understand the concern about the effect of this new policy on Bureau employees. Realizing that the policy would present some problems of implementation and adaptation, we deliberated for some time on the many factors involved. Since this Administration has placed emphasis on increased Indian self-determination and direction of Federal Indian programs, we began an intensive study last year on the Indian preference laws (including their legislative history and intent). From this study evolved a policy statement proposing an expansion of Indian preference. This was submitted to the Department of the Interior for review and comment by the Solicitor and other Departmental officials. On June 23, Secretary Morton announced his approval of the Bureau's [illegible] to include preference in the filling of vacancies by promotion. The U.S. Civil Service Commission, which has responsibility for such Federal programs as merit promotion and equal employment opportunity, has stated that our revised preference policy is "consistent with programs administered

by the Commission." They have advised us that no conflict exists in regard to provisions of the Equal Employment Opportunity Act of 1972, (PL 92-261) and Executive Order 11478.

The expanded Indian preference policy represents our acceding to the full Congressional mandate involved in the various statutes pertaining to preference, intending that preference be applicable to filling all vacancies in the Bureau, whether by initial appointment, reinstatement or promotion. The inclusion of promotions is an expansion of the policy which has been in effect since the passage of the 1934 Indian Reorganization Act, the latest law which expressly called for preference in Bureau employment. We have the responsibility, of course, of giving full effect to the Indian preference laws which Congress has enacted and that is the purpose of the policy revision approved by the Secretary. Any questions concerning the validity of those laws appear to be matters for judicial rather than administrative determination.

The revised policy is intended to provide increased developmental opportunities for Indians in the Bureau. It emphasizes our goal of achieving greater involvement of Indians in the administration of Indian programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people. It is unfortunate that some non-Indian employees now feel that their employment is in jeopardy. We want to assure them that the new policy does not affect their current jobs or employment status. There will be times when there are no qualified Indian candidates for positions and non-Indians will be selected for promotion; also, exceptions to the policy may be approved by this office when non-Indians have superior qualifications for particular positions.

We intend to maintain high quality leadership throughout the Bureau for the benefit of the Indians and to provide opportunity for Indians to assist their own people. The success of Bureau programs in serving the Indian populace depends to a large degree on the cooperation and

support of all employees. We hope that each employee's efforts will reflect that support of the Bureau's mission.

We are preparing the guidelines for a Federal Service Placement Program to assist employees interested in finding employment in other Bureaus' of the Department of the Interior, and other Federal agencies. When this program has been approved, you may be assured that each Bureau employee will be advised of the opportunity to participate in this program.

Sincerely yours,

/s/ John D. Crow
Deputy Commissioner

Enclosure
Constituent's Letter

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

MOTION TO DISMISS

COME NOW the defendants by the United States At-
torney, District of New Mexico, and move the Court for
an order dismissing the First Amended Complaint and
this action, and as grounds for such motion state that the
First Amended Complaint fails to state a claim upon
which relief can be granted. In support of this motion
the defendants would respectfully refer the Court to the
Preliminary Memorandum in Opposition to Motion for
Preliminary Injunction which has been filed herein by
the United States Attorney.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney
District of New Mexico
P. O. Box 607
Albuquerque, New Mexico 87103

I HEREBY CERTIFY that I mailed a true copy of the foregoing pleading to opposing counsel of record this 25 day of September, 1972.

/s/ Victor R. Ortega

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

MANCARI, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

AMERIND, Applicant For Intervention

MOTION TO INTERVENE AS DEFENDANT

COMES NOW Amerind, a non-profit national Indian organization, and moves this Honorable Court, pursuant to Rule 24, Federal Rules of Civil Procedure, for an Order granting leave to intervene in the case herein as a party defendant, and as grounds therefor, alleges:

1. That the above-captioned case, pending before this Honorable Court, involves questions of the constitutionality of the Indian Preference Statutes (25 U.S.C. 44, 45, 46, 472) and implementation thereof within the Bureau of Indian Affairs and Department of Interior.

2. That plaintiffs herein allege that the above-mentioned Indian Preference Statutes are unconstitutional on their face, or in the alternative, are unconstitutional as applied in the employment areas of training and promotion.

3. That Plaintiffs' allegations relating to the Indian Preference Statutes directly and substantially affect the rights of all present and prospective Indian employees of the Bureau of Indian Affairs. There are approximately 9,000 Indians employed by the BIA who will be substantially affected by the determination of issues raised in this case. (See Exhibit A.)

4. That the Applicant herein, Amerind, is a national non-profit Indian organization chartered under the laws of the State of New Mexico with membership comprised primarily of BIA Indian employees and organized with the express purpose of representing the rights of Indian employees of the Bureau of Indian Affairs.

5. That the Applicant, Amerind, avers that Plaintiffs' claims herein directly and substantially threaten the rights and interests of Amerind members as well as the rights of all Indian employees of the Bureau of Indian Affairs.

6. That Amerind avers that the Indian Preference Statutes are constitutional on their face and as applied, and that Amerind will raise in defense of said Indian Preference Statutes common questions of law and fact with the main action herein.

7. That Amerind, by virtue of its representation of the rights of Indian employees, is a real and necessary party of interest in this controversy.

8. That the Defendants herein are officials of the Bureau of Indian Affairs and Department of Interior and do not primarily nor directly represent the rights and interests of Indian employees of the BIA, particularly in reference to the Indian Preference Statutes and implementation thereof. That involved in this litigation are issues of interpretation of the Indian Preference Statutes and questions of implementation about which there have been grave differences and genuine controversy, particularly in the areas of promotion and training, between the Defendants and Indians employed in the BIA. The policies previously pursued by Defendants are not in accord with those urged by Indian employees, as exemplified in the case of *Freeman, et al. v. Morton et al.*, Civil Action No. 827-71, pending before the United States District Court for the District of Columbia, wherein several plaintiffs are members of Amerind.

9. That representation of Applicant's interest by the existing parties is or may be inadequate and might

result in Applicant's inability to protect the rights and interests of its members by any disposition of this action in its absence.

10. That intervention by Amerind as a party defendant will not significantly delay the action herein or jeopardize the rights of the parties herein.

11. That by reason of the above and foregoing, this Honorable Court cannot determine the controversy without prejudice to the rights of the Applicant and its members; that full and complete justice cannot be done without the presence of Applicant as a party herein; and that Applicant and the parties it represents are a necessary party in order to make a complete determination of the controversies herein.

WHEREFORE, Amerind requests an Order granting leave to the Applicant to intervene in this case as a party defendant.

Respectfully submitted,

SHERMAN & SHERMAN, P. C.

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1180 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

ARNOLD & PORTER

By /s/ Patrick J. MacRory
PATRICK J. MACROKY
1229 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 223-3200

EXHIBIT A

The following tables represent the number of Indians and non-Indians, classified by GS Grade and Wage Board level, employed by the BIA in November 1969:

<u>GS Grade</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
1	6	0	6
2	175	7	182
3	1,302	125	1,427
4	1,324	400	2,224
5	922	597	1,519
6	118	106	224
7	881	676	1,056
8	12	14	26
9	527	2,194	2,722
10	8	65	73
11	266	921	1,187
12	184	694	827
13	67	327	394
14	47	239	286
15	11	53	64
16	2	4	6
17	0	2	2
	<u>5,802</u>	<u>6,423</u>	<u>12,225</u>

<u>Wage Board</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
Less than \$5,000	68	8	76
\$ 5,000- 5,499	222	12	234
\$ 5,500- 5,999	359	22	381
\$ 6,000- 6,499	265	49	314
\$ 6,500- 6,999	424	60	484
\$ 7,000- 7,999	539	151	690
\$ 8,000- 8,999	381	201	582
\$ 9,000- 9,999	96	100	196
\$10,000-11,999	114	93	207
\$12,000-13,999	36	28	64
\$14,000-15,999	35	8	43
\$16,000-17,999	6	16	22
\$18,000-19,999	0	5	5
	<u>2,545</u>	<u>753</u>	<u>3,298</u>

Totals:

	<u>BIA Data</u>		
	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
GS Employees	5,802	6,423	12,225
Wage Board	2,545	753	3,298
	<u>8,347</u>	<u>7,176</u>	<u>15,523</u>

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

MANGANI, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

AMERIND, Applicant For Intervention

MOTION TO DISMISS

COMES NOW the Applicant for Intervention, Amerind, by and through its attorneys, and hereby moves this Honorable Court to dismiss plaintiffs' Complaint for Injunctive Relief and Plaintiffs' Motion for Preliminary Injunction. In support of its Motion, Applicant submits herewith a Memorandum of Points and Authorities.

SHERMAN & SHERMAN, P. C.

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

ARNOLD & PORTER

By /s/ Patrick J. MacRory
PATRICK J. MACRORY
1229 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 223-3200

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

[Original Filed in My Office, Nov. 21, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

ANSWER

The defendants for their answer to the First Amended Complaint state as follows:

FIRST DEFENSE

1. The allegations of paragraph IV are admitted insofar as they allege that the Commissioner of Indian Affairs, on or about June 26, 1972, transmitted a telegram to all area offices of the Bureau of Indian Affairs announcing that a policy of providing preference in promotions and training was to take effect immediately. However, while action may have been taken by Bureau of Indian Affairs officials pursuant to such telegram, the final policy of the Bureau is still in the process of being formulated. By further answer to such allegation, the defendants state that since the hearing on the motion for a preliminary injunction, the Bureau of Indian Affairs has decided not to grant preference to Indians in the matter of training, rendering such issue moot insofar as this litigation is concerned.

2. The material allegations of paragraphs V, VI, VIII and X are denied.

3. With respect to the allegations of paragraph VII, the defendants state that the Bureau of Indian Affairs has decided not to grant preference to Indians in training, rendering such issue moot insofar as this litigation is concerned. Further, the defendants state that they are informed and believe that no non-Indians have been denied a training opportunity since June 23, 1972 because of the new proposed preference policy and that training activity for Indians and non-Indians has proceeded in accordance with determined individual need. The remaining material allegations of paragraph VII are denied.

4. With respect to the allegations of paragraph IX, the defendants admit that when the new Indian preference policy is finally formulated, they will implement and enforce a policy of granting preference to Indians in the matter of promotions and reinstatement. The remaining material allegations of paragraph IX are denied.

5. Insofar as the allegations of paragraph I attempt to allege jurisdiction of this Court to entertain this action, the same are denied. The plaintiffs have failed to allege the jurisdictional amount required by 28 U.S.C. 1346(a) (2) and any amounts attributable to the members of the class cannot be aggregated in order to establish the jurisdictional amount required. The defendants admit the execution and genuineness of Personnel Management letter No. 72-12 issued by defendant Olson attached to the First Amended Complaint as Exhibit "A."

6. With respect to the allegations of paragraph II of the First Complaint, the defendants admit that this is a proper case for determination by a three-judge Court pursuant to 28 U.S.C. § 2282 and § 2284 in the event that this Court has jurisdiction under 28 U.S.C. § 1346(a) (2).

7. With respect to the allegations of paragraph III of the First Amended Complaint, defendants deny that the plaintiffs adequately represent all members of the class they purport to represent. Defendants are informed and believe that only the plaintiff Mancari has applied for a vacant position since June 23, 1972 and no final action

in the normal course of business has yet been taken with respect to her application.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

Insofar as jurisdiction is predicated on the Equal Employment Opportunity Act of 1972, Public Law 92-261, 86 Stat. 103 (March 24, 1972), plaintiffs have failed to exhaust the administrative remedies provided by such statute.

FOURTH DEFENSE

Since the inception of this action, the Bureau of Indian Affairs has decided not to grant preference to Indians in matters of training, rendering such issues moot in view of the fact that few, if any, non-Indians have been denied a training opportunity because of the proposed policy announced on June 23, 1972.

FIFTH DEFENSE

The plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

The proposed Indian preference policy alleged is constitutional and authorized by statute; however, it is not yet final and this Court should defer any decision other than a dismissal of this action until it is clear how this policy will ultimately be implemented in fact.

WHEREFORE, defendants pray that this action be dismissed with prejudice and that the cost of this action be assessed against the plaintiffs.

VICTOR R. ORTEGA
United States Attorney
District of New Mexico
P. O. Box 607
Albuquerque, New Mexico 87103

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 9626

C. R. MANCARI, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS
AMERIND, Intervener

ANSWER BY INTERVENER

COMES NOW the Intervener, Amerind by and through its attorneys and in answer to the complaint of Plaintiffs states as follows:

FIRST DEFENSE

The Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. The Court lacks jurisdiction over the subject matter in this action.

2. Plaintiffs, in relying upon the Equal Employment Opportunity Act of 1972, 86 Stat. 103' (March 24, 1972) have failed to exhaust their administrative remedies as provided by said statute and therefore, cannot invoke the jurisdiction of this Court.

THIRD DEFENSE

Each and every allegation set forth in Plaintiffs' complaint relating to preferences to Indians in the area of training has been rendered moot in view of the Bureau of Indian Affairs October 30, 1972 Regulations excepting training from the scope of the Bureau's new preference policies; and furthermore, upon information and belief

few, if any, non-Indians have been denied any training opportunities because of Indian Preference.

FOURTH DEFENSE

Intervener denies the material allegations of paragraphs 5, 6, 7, 8 & 10 and further denies the allegations of Paragraph 4 insofar as Defendants' have refused to extend Indian Preference in the area of training.

FIFTH DEFENSE

The Intervener denies the allegations set forth in the third paragraph of Plaintiffs' complaint and states that this action is not a class action and that Plaintiffs have no standing to represent this class fairly and adequately.

SIXTH DEFENSE

The Intervener maintains that the October 30, 1972 Policy of Defendants is constitutional and thereby authorizes a preference for Indian employees in the areas of promotion, re-instatement and initial employment.

WHEREFORE, Intervener prays that this action be dismissed with prejudice and that the costs of this action be assessed against Plaintiffs.

Respectfully submitted,

SHERMAN, QUINN and
SHERMAN

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203
892-6022

James Wechaler
Box 116
Crownpoint, New Mexico 87318

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS-APPELLEES

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS-APPELLANTS

v.

AMERIND, INTERVENOR-APPELLANT

NOTICE OF APPEAL

Pursuant to Rules 10 and 11, Supreme Court of the
United States, the above-named Appellant, Amerind, here-
by appeals to the United States Supreme Court from the
final order of the United States District Court for the
District of New Mexico, granting Appellees' Complaint
for injunctive relief, entered in this action on June 1,
1973.

This notice of appeal, filed this 29th day of June, 1973,
is taken pursuant to 28 U.S.C § 1253.

Respectfully submitted,

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
Attorney for Intervenor-
Appellant Amerind
1130 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

PROOF OF SERVICE

I, Harris D. Sherman, an attorney in the office of Sherman and Sherman, P.C., attorneys of record for Amerind, Appellant herein, depose and say that on the 28th day of June, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on C. R. Mancari, Anthony Franco, Wilbert Garrett, and Jules Cooper, Appellees herein, by mailing a copy thereof with airmail postage prepaid to John M. Kulikowski, counsel of record for Appellees, at the offices of Cotter, Atkinson, Campbell, Kelsey and Hanna, located at 1300 Bank of New Mexico Building, P. O. Drawer 1126, Albuquerque, New Mexico, 87103; on Rogers C. B. Morton, Louis R. Bruce, Walter O. Olson, and Anthony Lincoln, Appellants herein, by mailing a copy thereof with airmail postage prepaid to Victor Ortega, U.S. Attorney, Counsel for Appellants, U.S. Courthouse, Fifth and Gold, S.W., Albuquerque, New Mexico; and on The Solicitor General, Department of Justice, Washington, D.C. 20503.

/s/ Harris D. Sherman
Signed

Subscribed and sworn to before me, at the Capitol Life Center, Denver, Colorado, 80203, this 28 day of June, 1978.

My commission expires: October 31, 1978

/s/ Mary J. Jones
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 73-362

**ROGERS C. B. MORTON, SECRETARY
OF THE INTERIOR, ET AL., APPELLANTS**

v.

C. R. MANCARI ET AL.

**Appeal from the United States District Court
for the District of New Mexico**

**The statement of jurisdiction in this cause having been
submitted and considered by the Court, probable juris-
diction is noted.**

January 14, 1974

PLAINTIFF'S EXHIBIT 1

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-12
(800, 335, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights on non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and

is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

PLAINTIFF'S EXHIBIT 2

In Reply Refer To:

[SEAL]

Your Reference

UNITED STATES CIVIL SERVICE
COMMISSION

WASHINGTON, D.C. 20415

[Jul. 5, 1972]

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

My colleagues and I were pleased to learn that you recently approved a policy providing that Indians are to receive preference to all vacancies in the Bureau of Indian Affairs whether filled by original appointment, reinstatement, or promotion.

The Commission agree with your interpretation of the Indian preference laws and thus finds your policy reflecting this interpretation to be consistent with programs administered by the Commission. We are gratified that your Department and the Department of Health, Education, and Welfare are now in accord on this issue. We feel it is essential that the Federal government maintain a uniform approach to the application of Indian preference.

One aspect of the new policy causes us some concern and we suggest that it be given special consideration. To non-Indian employees, this is a matter of long-standing statutes suddenly being interpreted differently. After years of working under one set of rules these employees may feel that now their careers are in jeopardy, and with no change in the law to point to as the reason for the new conditions. As career Federal employees they have a right to expect that they will still be given every op-

portunity to fulfill their hopes and aspirations as was implied under the conditions which existed at the time they were employed. We urge this will be kept in mind as the new policy is carried out.

If our staff can be of any assistance to you or the Bureau of Indian Affairs in implementing the new policy please call on us.

By direction of the Commission:

Sincerely yours,

/s/ Robert E. Hampton
ROBERT E. HAMPTON
Chairman

PLAINTIFF'S EXHIBIT 3

[SEAL]

In Reply Refer To:
Personnel

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
FIELD SUPPORT SERVICES OFFICE
500 Gold Avenue, S.W.
P. O. Box 2026
Albuquerque, New Mexico 87108

[Sep. 08, 1972]

Memorandum

To: Mr. Victor Ortega
U.S. District Attorney

From: Personnel Officer
Field Support Services Office

Subject: Additional Information Requested Concerning
Deposition
C. R. Mancari, et. al. vs Rogers C. B. Morton,
as Secretary of Interior et. al.

The vacancy that was created by Mr. Robert McKinley's resignation has been filled by an Indian candidate. Mr. Begay was selected as a result of utilizing the Applicant Supply File. As was told during the proceedings of the deposition of September 6, 1972, the position was not advertised. Mr. Begay was qualified and was an Indian candidate he, therefore, was given an Excepted Appointment as Program Analyst, GS-9. Management always has the prerogative of employing outside candidates rather than promoting [illegible] current workforce.

Since the announcement of the expanded Preference Policy was disseminated 22 Promotional Opportunity Bulletins have been issued. As a result, 17 certificates have

been forwarded to operating officials or selecting offices for action. Selections have been made and 15 Indians were selected and two non-Indians have been selected.

No selections have been made on the remaining five certificates.

/s/ Carl G. McMullen
CARL G. MCMULLEN
Personnel Officer, FSSO

PLAINTIFF'S EXHIBIT 4

ALBUQUERQUE AREA OFFICE

PROMOTIONS FROM JUNE 24, 1972 TO SEPTEMBER 24, 1972

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		4
	5		5
	6		6
	7		7
	8		8
	9		9
	10		10
	11		11
	12		12
	13		13
	14		14
	15		15
<u>Total</u>	18	<u>Total</u>	09

PLAINTIFF'S EXHIBIT 5

ALBUQUERQUE AREA OFFICE

PROMOTIONS FROM JANUARY 1, 1972 TO JUNE 26, 1972

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		3
	5		0
	6		0
	7		2
	8		0
	9		1
	10		0
	11		0
	12		0
	13		0
	14		0
	15		0
Total	20	Total	17

PLAINTIFF'S EXHIBIT 6

[SEAL]

In Reply Refer To:
Personnel Management
BCCO-3875

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Sep. 1, 1972]

Honorable Bob Packwood
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

We have received your inquiry on behalf of three of your constituents regarding the expanded policy granting preference to Indians in promotion in this Bureau.

We can understand the concern about the effect of this new policy on Bureau employees. Realizing that the policy would present some problems of implementation and adaptation, we deliberated for some time on the many factors involved. Since this Administration has placed emphasis on increased Indian self-determination and direction of Federal Indian programs, we believe an intensive study last year on the Indian preference laws (including their legislative history and intent). From this study evolved a policy statement proposing an expansion of Indian preference. This was submitted to the Department of the Interior for review and comment by the Solicitor and other Departmental officials. On June 23, Secretary Morton announced his approval of the Bureau's policy [illegible] to include preference in the filling of vacancies by promotion. The U.S. Civil Service Commission, which has responsibility for such Federal programs as merit promotion and equal employment opportunity, has stated that our revised preference policy is "consistent with programs administered by the Commission." They have advised us that no conflict exists in regard to pro-

visions of the Equal Employment Opportunity Act of 1972, (PL 92-261) and Executive Order 11478.

The expanded Indian preference policy represents our acceding to the full Congressional mandate involved in the various statutes pertaining to preference, intending that preference be applicable to filling all vacancies in the Bureau, whether by initial appointment, reinstatement, or promotion. The inclusion of promotions is an expansion of the policy which has been in effect since the passage of the 1934 Indian Reorganization Act, the latest law which expressly called for preference in Bureau employment. We have the responsibility, of course, of giving full effect to the Indian preference laws which Congress has enacted and that is the purpose of the policy revision approved by the Secretary. Any questions concerning the validity of those laws appear to be matters for judicial rather than administrative determination.

The revised policy is intended to provide increased developmental opportunities for Indians in the Bureau. It emphasizes our goal of achieving greater involvement of Indians in the administration of Indian programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people. It is unfortunate that some non-Indian employees now feel that their employment is in jeopardy. We want to assure them that the new policy does not affect their current jobs or employment status. There will be times when there are no qualified Indian candidates for positions and non-Indians will be selected for promotion; also, exceptions to the policy may be approved by this office when non-Indians have superior qualifications for particular positions.

We intend to maintain high quality leadership throughout the Bureau for the benefit of the Indians and to provide opportunity for Indians to assist their own people. The success of Bureau programs in serving the Indian populace depends to a large degree on the cooperation and support of all employees. We hope that each employee's efforts will reflect that support of the Bureau's mission.

We are preparing the guidelines for a Federal Service Placement Program to assist employees interested in finding employment in other Bureaus' of the Department of the Interior, and other Federal agencies. When this program has been approved, you may be assured that each Bureau employee will be advised of the opportunity to participate in this Program.

Sincerely yours,

/s/ John D. Crow
Deputy Commissioner

Enclosure
Constituent's Letter

PLAINTIFF'S EXHIBIT 7

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P. O. Box 8327
Albuquerque, New Mexico 87108

Announcement No.: AAO 27/72

Position: Training Instructor (Basic Numerical Processing) CS-1712-9

Date: August 29, 1972

Location: Southwestern Indian Polytechnic Institute Albuquerque

Mrs. Evelyn Sellers Brannan
P.O. Box 362
Belen, New Mexico

Dear Mrs. Brannan

Your qualifications for the position shown above have been considered with those of other eligible candidates. Clarence Coriz was selected for the position.

Your application has been returned to the office of the Civil Service Commission with which you filed it. Your name will be put back on the list of eligibles in that office and you will be considered for certification for other positions for which you are eligible.

Sincerely yours,

Chief, Personnel Services Section

PLAINTIFF'S EXHIBIT 8

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P. O. Box 8327
Albuquerque, New Mexico 87108

[Sep. 26, 1972]

Mrs. Evelyn S. Brannan
P. O. Box 362
Belen, New Mexico 87002

Dear Mrs. Brannan:

This is in reply to your letter of September 14 to Mae Hall regarding the Selection of Clarence Coriz to the position of Training Instructor (Basic Numerical Processing).

Your application was certified to us by the Civil Service Commission along with other qualified applicants for the purpose of supplementing our own certificate of employees eligible for promotion.

Mr. Coriz, a candidate eligible to Indian Preference in initial employment was selected.

Thank you for your interest in employment with us.

Sincerely yours,

Chief, Personnel Services Section

PLAINTIFF'S EXHIBIT 9

Personnel-601

[Jul. 13, 1972]

Through: Superintendent, Southwestern Indian Polytechnic Institute

Mr. Clyde McFalls
Audio-Visual Production Specialist
Southwestern Indian Polytechnic Institute
Albuquerque, New Mexico 87114

Dear Mr. McFalls:

This is in response to your telephone request for a written statement as to why you were not on the certificate for Visual Information Specialist, GS-1084-9, Branch of Instruction, Southwestern Indian Polytechnic Institute.

We are enclosing a copy for your ready reference of the teletype from the Commissioner dated June 26, 1972, distributed to all employees. Please note that the new Indian Preference policy states that where two or more candidates meet the established qualification requirements for the vacancy, if one is an Indian, he shall be given preference in filling the vacancy.

Therefore, to comply with the Commissioner's new Indian Preference policy, the Indian applicant was the only applicant certified for consideration.

Sincerely yours,

/s/ H. Mannie Foster
Acting Area Personnel Officer

Enclosure
601/M Hall/fma/07-13-72
File
Chrono

PLAINTIFF'S EXHIBIT 10

[SEAL]

In Reply Refer To:
Personnel Mgmt.

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Nov. 20, 1972]

Memorandum

To: Associate Solicitor-Indian Affairs
From: Commissioner of Indian Affairs
Subject: Data Requested for Mancari v. Morton

We are furnishing the following information on promotions in the Bureau of Indian Affairs in response to the request made by Plaintiffs' counsel. These figures represent the Bureauwide total of "promotion plan actions," i.e., promotion from one position to a different position; as requested, they do not include "career promotions" or "reclassification" actions.

<u>Jan. 1-June 23, 1972</u>		<u>June 24-Nov. 15, 1972</u>	
Indian	— 96	Indian	— 259
Non-Indian	— 75	Non-Indian	— 85

The smaller number of actions during the earlier period reflects the existence of Departmental and Bureau restrictions on hiring and promotions as a result of Federal efforts to reduce employment and average grade.

/s/ John D. Crow
Commissioner

PLAINTIFF'S EXHIBIT 11

DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS
FIELD ADMINISTRATIVE OFFICE
Albuquerque, New Mexico 87103

VACANCY ANNOUNCEMENT

Position: Computer Systems Analyst GS-334-9 (Five Positions)	FAO-6-72 Bulletin No.
Location: Indian Affairs Data Center Data Processing Branch Albuquerque, New Mexico	04-03-72 Issuing Date
Area of Consideration: Bureau Wide	04-17-72 Closing Date

- Final action on Filing these positions will be subject to Central Office approval and employment ceiling limitations.

LIVING AND WORKING CONDITIONS-DUTIES-ED-
UCATION AND EXPERIENCE REQUIREMENTS

LIVING AND WORKING CONDITIONS: This position is physically located in Albuquerque, New Mexico. No Government housing is available, however, housing accommodations for purchase or rent are in adequate supply in Albuquerque, a rapidly growing city with a metropolitan population in excess of 250,000. It is centrally located on U.S. Highways 66 and 85, has excellent public and parochial schools, grades 1 through 12, plus the University of New Mexico and the University of Albuquerque and has churches of 28 denominations. Varied sport facilities are available including skiing, hunting, fishing and golf. The altitude is approximately 5,200 feet; average year-round temperature is 70.6 degrees, with lots of sunshine and humidity is low. There is occasionally light snow in the winter.

ALL QUALIFIED APPLICANTS WILL RECEIVE CONSIDERATION WITHOUT REGARD TO RACE, COLOR, SEX, POLITICS, RELIGION OR NATIONAL ORIGIN. APPLICATIONS FROM QUALIFIED PERSONS NOT CURRENTLY EMPLOYED BY THE FEDERAL GOVERNMENT WILL BE CONSIDERED AS "OUTSIDE" APPLICANTS. IN THE EVENT SELECTION IS MADE FROM AMONG "OUTSIDE" APPLICANTS, INDIVIDUALS OF $\frac{1}{4}$ OR MORE INDIAN ANCESTRY WILL BE GIVEN PREFERENCE BY LAW, IN INITIAL EMPLOYMENT OR REEMPLOYMENT. SUCH INDIAN PREFERENCE APPLICANTS SHOULD INDICATE THEIR DEGREE OF INDIAN BLOOD AND PLACE OF ENROLLMENT ON THE APPLICATION FOR FEDERAL EMPLOYMENT. CONFIRMATION OF ELIGIBILITY FOR INDIAN PREFERENCE WILL BE REQUESTED FROM THE APPLICANT, IF SELECTED, AND WILL REQUIRE SUBMISSION AT THAT TIME OF CERTIFICATE OF DEGREE OF INDIAN BLOOD FROM THE AGENCY WHERE ENROLLED.

TO APPLY: APPLICATIONS AND NOMINATIONS SHOULD BE FORWARDED THROUGH SUPERVISORY CHANNELS TO THE PERSONNEL OFFICER, FIELD ADMINISTRATIVE OFFICE, P. O. BOX 2026, ALBUQUERQUE, NEW MEXICO 87103.

Duties: The incumbent works under the general supervision of the Chief, Inventory and Accounting Reporting Unit. Participates in analytical studies associated with the automating of work processes and in the design and development of data system details for programming requirements. The incumbent has responsibility for system analysis and design and is primarily concerned with how to automate work functions to comply with stated requirements of users or prospective users. Specifications supplied will state the data processing needs of the organization requesting service. Incumbent may

PLAINTIFF'S EXHIBIT 12

UNITED STATES GOVERNMENT

Memorandum

Date: June 27, 1972

To: All IADC Employees

From: Executive Officer

Subject: Weekly Newsletter

General

The Bureau of Indian Affairs has revised its policy in regard to granting preference to Indians in employment. In a telegram to the field offices of the Bureau, the Commissioner states:

"The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. The new policy was discussed with the national president of the National Federation of Federal Employees under national consultation rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately and is incorporated into all existing programs such as the promotion program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy.

(Signed) Louis R. Bruce"

The Personnel Office has advised the Data Center that it is recalling all certificates issued for the filling of positions to determine that the eligibles listed on them meet the terms of the new Bureau policy.

For the information of employees, the following table shows the status of non-Indian/Indian employment as of May 31, 1972 by grade, for each division and the Data Center as a whole:

PLAINTIFF'S EXHIBIT 13

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIORBUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

MERIT PROMOTION PROGRAM
VACANCY ANNOUNCEMENT

[Nov. 22, 1972]

Position(s): VISUAL INFORMATION SPECIALIST
GS-1084-9, POS. E40.9749ALocation: SOUTHWESTERN INDIAN POLYTECH-
NIC INSTITUTE BRANCH OF INSTRU-
TION, ALBUQUERQUE, NEW MEXICO

Area of Consideration: AREA WIDE

SPECIAL REFERENCES: SEE PARAGRAPH #1
BELOWALL QUALIFIED APPLICANTS WILL RECEIVE
CONSIDERATION WITHOUT REGARD TO RACE,
COLOR, SEX, POLITICS, RELIGION OR NATIONAL
ORIGIN.INDIAN PREFERENCE: IN COMPLIANCE WITH
THE PROVISIONS OF THE INDIAN PREFER-
ENCE ACT AND IMPLEMENTING REGULA-
TIONS, NON-INDIAN OUTSIDE APPLICANTS
(i.e., REINSTATABLES, OR CIVIL SERVICE
REGISTER ELIGIBLES WILL NOT BE USED TO
SUPPLEMENT A PROMOTION CERTIFICATE
IF A QUALIFIED INDIAN PREFERENCE ELI-
GIBLE, ALSO COMPETING FOR INITIAL EM-
PLOYMENT OR REEMPLOYMENT IS ON FILE
AND AVAILABLE.

TO APPLY: APPLICANTS CURRENTLY ON DEPARTMENT OF INTERIOR SHOULD COMPLETE FORM 5-4402 AND SUBMIT THROUGH SUPERVISORY CHANNELS. EACH APPLICATION MUST BE ACCOMPANIED BY A SUPERVISOR'S ASSESSMENT OF POTENTIAL AND SUPERVISOR'S APPRAISAL OF PERFORMANCE (FORM 5-4403). CANDIDATES ON THE ROLES OF OTHER AGENCIES MAY APPLY BY COMPLETING SF-171 AND INCLUDING A SUPERVISORY APPRAISAL AND ASSESSMENT OF POTENTIAL USING LOCAL AGENCY FORMS. INDIAN PREFERENCE ELIGIBLES OF $\frac{1}{4}$ DEGREE INDIAN BLOOD. (OUTSIDE APPLICANTS), MAY RECEIVE CONSIDERATION BY COMPLETING SF-171. A CERTIFICATE OF INDIAN BLOOD MUST ACCOMPANY EACH APPLICATION IF "INDIAN PREFERENCE IN INITIAL APPOINTMENT IS CLAIMED.

FORM 638

1. Applications received within the established closing date will be considered against the above-cited vacancy. Applications rated as "highly qualified" and not selected will be retained after completing this action and will be considered against other like vacancies that may develop. Employees interested in consideration against the above described position or other like positions, should apply for consideration against announcement. Like requirements may not be reannounced for a period of three months following the closing date unless an adequate supply of "highly qualified" candidates is not on file.

PLAINTIFF'S EXHIBIT 14

MERIT PROMOTION PLAN CERTIFICATE
OF PROMOTABLE CANDIDATES

Vacancy Announcement No. AAO 25/72 Dated 6/19/72

Date of Certificate 7/9/72 Position Title and Grade Visual Information Specialist, GS-1084-9; Installation, Activity, and Location Southwestern Indian Polytechnic Institute, Br of Instruction, Albuquerque

BEST Qualified Promotable Candidate, listed in alphabetical order PCB Applicant Promotable-GS-9

Clark, David (NMN) (Indian Veteran)

Reason for selection

The certificate AAO 25/72, Audio-Visual Information Specialist, only referred one candidate for consideration. We are requesting that AAO 25/72 be readvertised Bureau-wide for an additional two weeks. This will enable the selecting official the opportunity of considering additional Indian candidates for this position.

per-supervisors request

/s/ [illegible]
Selecting OfficialActing Supt.
Title7/21/72
Date

PLAINTIFF'S EXHIBIT 15

Illustration 8

**MERIT PROMOTION PLAN CERTIFICATE
OF PROMOTABLE CANDIDATES****Vacancy Announcement No. AAO 25/72 Dated 6/19/72****Date of Certificate 8/25/72, Position Title and Grade Visual Information Specialist, GS-1084-9, Pos. E40.9729A
Installation, Activity, and Location SIPI, Br of Instruction Albuquerque****BEST Qualified Indian Candidates, listed in alphabetical order****Clark, David
Montoya, Tommy E.****Reason for selection****Selecting Official****Title****Date**

PLAINTIFF'S EXHIBIT 17**January 27, 1972****Assistant Superintendent (Administration)****Assistant Superintendent (Instruction)****Education Specialist Position C40.9710A, GS-1710-11**

Due to the situation concerning the employment ceiling and freeze imposed by Area Personnel Office, I am assigning Mr. Ray Brown to be Acting Education Specialist until such time as the Personnel Office will allow us to promote Mr. Brown to this position.

/s/ Jack R. Anderson
Assistant Superintendent, Instruction

cc: Felts
Brown
Valdo
OPF (Brown)

DEFENDANT'S EXHIBIT A

[Aug. 21, 1972]

GC:LEG 1
GLG:rgh

Mr. Nathan T. Wolkomir
President, National Federation
of Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Dear Mr. Wolkomir:

This is in response to your recent letter of July 17, 1972, in which you called upon the Civil Service Commission to vigorously enforce the civil service laws. Indeed, this is exactly what we believe we are doing.

We must agree with your statement that in interpreting laws, first recourse must be to the intent of the law as embodied in the legislative history of the law, and then to the canons of interpretation. The clear intent of the legislature at the time of the passing of Indian preference laws was to give Indians more control and influence in the affairs that directly concerned them. It was a positive action, not a negative one serving to deprive all other Bureau of Indian Affairs (BIA) employees of their civil service rights.

The basic responsibility and authority to interpret and implement the Indian preference laws rests with the Department of the Interior and the Department of Health, Education, and Welfare, rather than with our Commission. The most recent of the Indian preference laws, the Indian Reorganization Act of 1934, initially authorized the Secretary of the Interior to implement the section providing for Indian preference. Later, when the responsibility for the Indian Health program was transferred to the Public Health Service, comparable authority for carrying out Indian preference requirements was given to the Surgeon General of the Public Health Service.

However, this is not to say that the Civil Service Commission has relinquished its duty to protect the rights of other civil service employees. In this regard we have been conferring with departmental-level staff of the Department of the Interior and the Department of Health, Education, and Welfare, as well as with representatives of BIA and Indian Health Service (IHS).

I can assure you that the Commission reviewed the matter of Indian preference very thoroughly before furnishing our views to the two Secretaries concerned. For one thing, we appreciated the career aspirations of non-Indian employees of the Indian agencies. For another, we realize we were concerned here with a long-standing interpretation of a law affecting a substantial number of positions. In the end, though, the Commission found it appropriate to agree with the interpretation that preference for Indians applied under this law to promotions, as well as initial appointments.

I can also assure you that we gave careful attention to the Equal Employment Opportunity Act of 1972. Section 717 (a) of that Act provides that "all personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." This section is a general provision of law prohibiting discrimination. The Indian preference laws, however, are specific legislation, directed to a particular group of individuals and a very limited area of Government operations. Since all laws must be interpreted in such a way that interpretations be harmonious, the more specific provisions will take precedence over general provisions. In this instance, it is reasonable to consider that Congress intended preference for Indians in the Indian agencies to be an exception from the general discriminatory prohibitions.

It is certainly true that the Equal Employment Opportunity Act of 1972 was enacted after the Indian preference laws were passed. But it does not follow from this fact alone that the later law takes precedence. When the Equal Employment Opportunity Act was passed, Con-

gress did not specifically repeal Indian preference, as it might well have. Clearly the courts do not look with favor upon implied repeals.

We believe that both laws are consistent, and will continue to watch over the rights of Federal employees under both laws.

Sincerely yours,

Robert E. Hampton
Chairman

GC:GLGODBERG:rgh
t.d. 8/16/72

DEFENDANT'S EXHIBIT B

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

Memorandum

To: Director of Personnel.

From: The Solicitor.

Subject: Indian preference in employment.

On December 26, 1946, in connection with a proposed statement involving personnel policy affecting Indian employees, you requested my opinion on the following questions:

- (1) Under the Indian preference and the veterans' preference laws, does a qualified Indian who is not a veteran have preference in employment over a non-Indian veteran?
- (2) Is Indian preference applicable to other than appointment and separation actions? In other words, does Indian preference necessarily apply to promotion from grade to grade within the service? (The second question is understood to refer to cases of promotion to fill a vacancy which might occur either by establishment of a new position or the vacation of an already established position for any reason.)

It is my opinion that affirmative answers are required to both questions.

Section 12 of the Wheeler-Howard Act, also known as the Indian Reorganization Act (48 Stat. 986, 25 U. S. C. sec. 472), provides that:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such *qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.*"
(Emphasis supplied.)

This provision implemented miscellaneous provisions contained in the acts of June 30, 1834 (4 Stat. 737, 25 U. S. C. sec. 45), May 17, 1882 (22 Stat. 88, 25 U. S. C. sec. 46), as amended by the act of July 4, 1884 (23 Stat. 97), August 15, 1894 (28 Stat. 313, 25 U. S. C. sec. 44), and April 30, 1908 (35 Stat. 71, 25 U. S. C. sec. 47), as amended by the act of June 25, 1910 (36 Stat. 861), all of which required preference employment of Indians in various circumstances. Its purpose, to accord a special employment preference for Indians, is reflected in the following statement of Congressman Howard, coauthor, made during the course of debate on the bill (S. 3645):

"In order that the Indian, after being educated in a practical way, may pursue his trade or vocation and be preferred in positions upon Indian reservations, we have set up in the bill reported a preference for him and we have provided and directed a special set-up without regard to the civil-service laws, whereby he can establish a rating for such reservation positions." (78 Cong. Rec. 12164 (1934).)

Section 18 of the Veterans' Preference Act of 1944 (58 Stat. 391, 5 U.S.C. sec. 869), provides that:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regula-

tion, or any department of the Government or officer thereof." (Emphasis supplied.)

Since all of the statutes granting preference rights were enacted prior to the Veterans' Preference Act of 1944, it is clear that such rights were now abrogated by the latter act. Your first question is therefore answered in the affirmative.

I think it is equally clear that the second question requires an affirmative answer. Section 12 refers to the "various positions *maintained, now or hereafter*, by the Indian Office." (Emphasis supplied.) While the excerpt quoted above refers to "positions upon Indian reservations," the language finally enacted extends to all positions in the Indian Service. This fact has been recognized by the Civil Service Commission by placing in an excepted status under Schedule A of the civil-service rules, "Positions in the Bureau of Indian Affairs, Washington, D. C., and in the field, when filled by the appointment of Indians * * * ." In its Minute No. 2, of October 29, 1942, the Commission ruled that these positions, if occupied by Indians, were not brought into the classified service by the Ramspect Act and Executive Order No. 8743. See 78 Cong. Rec. 11123, 11126, 11127, 11137 (1934).

It therefore is my conclusion, under the foregoing statutes, that (1) a qualified Indian who is not a veteran has preference in employment over a non-Indian veteran, and (2) such preference extends to the filling of all vacancies within the service.

MASTIN G. WHITE,
Solicitor.

[CIVIL ACTION No. 327-71]

DEFENDANT'S EXHIBIT C**[SEAL]**

**In Reply Refer To:
BCCO 6746**

**UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242**

[Jun. 25, 1972]

**Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510**

Dear Senator Kennedy:

This is in further reply to your letter of May 7, 1970, also signed by Senators Harris, Mondale, and McGovern, which requested information regarding the employment and training practices of the Bureau of Indian Affairs. (Our letter dated May 19, 1970, indicated this further reply was forthcoming.)

(1) How many Indians and non-Indians are employed by the Bureau of Indian Affairs in each GS rating category? (In the interest of providing the fullest possible information, we have also provided information as it pertains to wage system categories and executive pay.)

Full-Time Employment

<u>General Schedule</u>	<u>Indian</u>	<u>Non-Indian</u>
GS-1	6	—
2	175	7
3	1,302	125
4	1,824	400
5	922	597
6	118	106
7	381	675
8	12	14
9	527	2,195
10	8	65
11	266	921
12	134	693
13	67	327
14	47	239
15	11	53
16	2	4
17	—	2
Sub-total	5,803	6,423

<u>Wage System</u>	<u>Indian</u>	<u>Non-Indian</u>
Less than \$5,000	68	8
\$5,000- 5,499	222	12
5,500- 5,999	359	22
6,000- 6,499	265	49
6,500- 6,999	424	60
7,000- 7,999	539	151
8,000- 8,999	381	201
9,000- 9,999	96	100
10,000-11,999	114	93
12,000-13,999	36	28
14,000-15,999	35	8
16,000-17,999	6	16
18,000-19,999	—	5
Sub-total	2,545	753
Executive Pay	1	—
Grand Total	8,349	7,176

The information given above was taken from the Minority Group Employment Report of November 30, 1969, since this was the most current information the computer could provide. Since that time, the Bureau has under-

gone an executive realignment with corresponding changes in the executive staff. Ten out of sixteen positions were filled with Indians, and plans are to fill six out of the remaining eight executive positions with Indians.

(2) Are on-the-job training programs equally available to Indians and non-Indians? In the past year, how many Indians and non-Indians participated in on-the-job training programs?

The Bureau, by issuance of the Bureau of Indian Affairs Manual, has established a policy of long standing, whereby training is equally available to Indians and non-Indians. There are, however, three programs presently in effect (please see enclosures 1, 2, and 3) which are available only to Indian employees. These programs were established to combat Indian unemployment and accelerate the development of Indian leaders. Participation in these programs was limited to Indians to permit the development of a training format more ideally suited to developmental needs and to facilitate program evaluation. We do not feel that the existence of these programs discriminates against non-Indian employees, since counterpart programs are generally available for all employees.

Bureau training records are set up to report training "instances." Each time an employee—Indian or non-Indian—receives training, this constitutes a training "instance." If, for example, an Indian received training three times in one year, this would constitute three training "instances."

In answering this question and question no. 7, we are reporting training "instances," as this provides a more complete picture of the Bureau's training effort in terms of the amount of training received by Indians and non-Indians.

During the past year, Indian employees participated in on-the-job training in 6,657 instances, and non-Indian employees participated in on-the-job training in 3,296 instances.

The above figures do not include interagency training (training with another Government facility) or non-Government training, as we have placed a strict interpretation on the term "on-the-job." Interagency and non-Government attendance is included in our answer to question 7, which also includes the totals provided by this answer.

(3) How many Indians and non-Indians are in supervisory positions?

One thousand one hundred forty-eight Indians and 2,307 non-Indians are in supervisory positions.

(4) In the past year, how many Indians and non-Indians were promoted? For each group, what was their average period of employment in the grade level prior to promotion?

<u>Indian</u>	<u>Non-Indian</u>
Total no. promoted 1,032	Total no. promoted 982
Average time in grade 38.5 mo.	Average time in grade 40 mo.

(5) Is the Bureau involved in any Management Intern programs? If so, how many Indians and non-Indians are participating?

The Bureau operates two programs which may be termed "Management Intern" programs—"The Indian Administrator Development Program" and the "Bureau Field Management Training Program." (Enclosures 1 and 2). In addition, the Bureau participates in two Departmental Interns which may be termed "Management Intern" programs—"The Consolidated Departmental Management Development Program" and the "Departmental Administrative Management Training Program (enclosure 6).

Due to Fund limitations, participation in these programs has been restricted; however, the division of participation—Indian and non-Indian—has been as follows:

<u>Indian</u>	<u>Non-Indian</u>
8	8

(6) In the past year, how many Indians and non-Indians were hired by the BIA at each GS grade level?

To assure that you receive a complete answer to your question, we are including information relative to employment of wage system personnel. The answer to this question is provided by enclosure 6, which is a computer printout.

(7) What "on-the-job" educational opportunities exist for BIA employees, and how many Indians and non-Indians participated in such programs during the past year? What was the total cost to the Bureau to operate such programs, and how much of that total was expended on Indians and non-Indians?

We have assumed that this question seeks information relative to the Bureau's total training effort—on-the-job training, interagency training, and non-Government facility training. The number of training "instances" as reported, therefore, includes intrabureau on-the-job training (as reported by the answer to your second question), and in addition, "instances" of interagency training (training provided by other Government agencies) and non-Government facility training (training provided by colleges, universities, and other private facilities).

Indian

Total training instances 8,536
Total training cost \$312,161

Non-Indian

Total training instances 10,649
Total training cost \$368,025

Present management of the Bureau is actively seeking to promote the training and upward mobility of Indians. To accomplish this, we are seeking to expand the funding of established programs (please see enclosures 1, 2, and 3), and to establish new programs, as appropriate. In addition, we have taken steps to assure that undertaken training is strictly in accordance with determined need (please see enclosure 8). This procedure, we feel, will assist us in assuring that Indians in need of training will not be neglected.

If we can be of further assistance, please contact us.

Sincerely yours,

/s/ Louis R. Bruce
Commissioner

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5. Personnel Management Letter to the field from Mr. Walter O. Olson, Area Director—Indian Preference—06-23-72
6. Memo to All Bureau Employees from Commissioner Bruce Bureau Policy of Indian Preference—07-03-72
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FILE OF MANNIE FOSTER, ACTING AREA PERSONNEL OFFICER, BUREAU OF INDIAN AFFAIRS, PRODUCED AT THE TAKING OF HIS DEPOSITION OF SEPTEMBER 6, 1972.

[SEAL]

Chairman

**UNITED STATES CIVIL SERVICE
COMMISSION
WASHINGTON, D.C. 20415**

[Jul. 11, 1972, Assistant Secretary, P.L.M.]

[Jul. 3, 1972]

Action Office
For info only

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D. C. 20240

Dear Mr. Secretary:

My colleagues and I were pleased to learn that you recently approved a policy providing that Indians are to receive preference to all vacancies in the Bureau of Indian Affairs whether filled by original appointment, reinstatement, or promotion.

The Commission agrees with your interpretation of the Indian preference laws and thus finds your policy reflecting this interpretation to be consistent with programs administered by the Commission. We are gratified that your Department and the Department of Health, Education, and Welfare are now in accord on this issue. We feel it is essential that the Federal government maintain a uniform approach to the application of Indian preference.

One aspect of the new policy causes us some concern and we suggest that it be given special consideration. To non-Indian employees, this is a matter of long-standing statutes suddenly being interpreted differently. After years of working under one set of rules these employees may feel that now their careers are in jeopardy, and with no change in the law to point to as the reason for

the new conditions. As career Federal employees they have a right to expect that they will still be given every opportunity to fulfill their hopes and aspirations as was implied under the conditions which existed at the time they were employed. We urge this will be kept in mind as the new policy is carried out.

If our staff can be of any assistance to you or the Bureau of Indian Affairs in implementing the new policy please call on us.

By direction of the Commission:

Sincerely yours,

/s/ Bob

ROBERT E. HAMPTON
Chairman

[SEAL]

In Reply Refer To:
Personnel Mgmt.

**UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242**

[Jul. 19, 1972]

**[Received, Jul. 24, '72, Area Director's Office—
AAO-BIA]**

Air Mail

Memorandum

**To: Area Directors
 Acting Administrator, Field Support Services
 Office
 Director of Southeast Agencies**

From: Commissioner of Indian Affairs

**Subject: Partial Revision of 44 BIAM 335 Promotion
 and Internal Placement**

The attached draft is being forwarded for your review and comments. The changes for the Promotion Program are in accordance with the policy which was announced on June 23 by the Secretary expanding Indian preference to include promotion and training, as well as initial employment and reinstatement.

The only proposed changes in the Promotion Program are ones to implement preference in promotion consideration. A complete revision of the program will be issued later for comment. Before discussions are held with employees, employee organizations, and tribal groups, we suggest that copies of paragraphs of the current program which

are being changed be furnished the reviewing officials since in some instances only a portion of the paragraph will be revised.

Please submit your comments and suggestions to the Division of Personnel Management not later than August 7, 1972.

/s/ Louis R. Bruce
Commissioner

Attachment

This statement will supersede .1 Policy 44 BIAM 335, 3.1

.1 Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filing a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment.

All items remain the same except for I.

.12 Content of Announcement

I. The following statement will be included on each POB issued: "In filling vacancies by promotion, original appointment or reinstatement, priority in selection will be given to candidates who are eligible for Indian preference."

Items A, C, D, E, F, and G remain the same.

.14 *Methods and Procedures for Consideration.*

B. *Applications*

An employee may file for an announced vacancy by submitting an SF-171 through supervisory channels to the appropriate job holding office. The supervisory will complete an evaluation form to attach to the application.

An employee who claims Indian preference is responsible for submitting a certificate of Indian blood with his application if none is currently on record. *Indian preference in promotions will not be considered unless there is a CIB on file.*

.17 A & B are new—pen and ink change renumbering old 17B to 17C; old 17C to 17D; old 17D to 17E.

.17 *Evaluating Eligible Candidates*

All qualified eligible candidates to be considered for a vacancy will be arranged in two groups—Indian and non-Indian.

A. *Method of Evaluating.* Candidates who are basically eligible will be evaluated on a combination of factors dealing with their overall knowledge, skills, education, and experience. Rating panels will be established, unless it is impracticable to do so, in order to rate candidates for positions at GS-5 and above under the Promotion Plan. When rating panels are used in the evaluation process, personnel staff members and the selecting official may serve only in a technical or advisory capacity.

B. *Evaluation of Outside Candidates.* When recruitment efforts are extended to include applications from candidates outside the Federal service and other Federal agencies, these applications will be rated, ranked, and certified in the same manner as employees applying for consideration. When written evaluations are not available, telephone contacts with former or present employers will be documented as the supervisor's evaluation.

This paragraph will supersede entire paragraph .18.

.18. *Ranking and Selection*

A. *Ranking by Category*

1. *Indian candidates.* All Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates."

2. *Non-Indian Candidates.* All non-Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates."

B. *Referral of Candidates to Selecting Official (Certification)*

1. Certificates listing the best qualified Indian and non-Indian candidates will be issued simultaneously to the selecting official. Each certificate will be prepared listing the best three to five of the highly qualified candidates. If meaningful distinctions cannot be made among them, as many as 10 names may be certified. All best qualified candidates will be listed in alphabetical order. Applications of qualified Indian candidates whose names are not listed on the "best qualified" certificate will be referred separately to the selecting official for his review.

2. When a non-Indian is selected to fill a vacancy, and Indian candidates have been certified for selection, the selecting official must submit, by memorandum to the servicing Personnel Office, a complete justification as to why the non-Indian has been selected. The justification will be forwarded to the Washington Office, Bureau Manpower

Committee for review and approval by the Commissioner.

3. A selecting official shall not notify a candidate of his selection until the Personnel Office has obtained all necessary clearances.

Statement to include on certificate of non-Indian candidates.

Certificate of non-Indian Candidates

The selection of a candidate from this certificate is subject to approval by the Commissioner if there are qualified Indians available.

[Jul. 3, 1972]

Mr. Nathan T. Wolkomir
President, National Federation of
Federal Employees
1737 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Wolkomir:

This is in reply to your letters regarding the implications of the policy on Indian preference recently established in the Department of Health, Education, and Welfare and the Department of the Interior.

We have been involved in discussions on Indian preference during the past months with representatives of both Departments as well as with representatives of the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). It is clear from these discussions that the traditional interpretation of the Indian preference laws established through the years by BIA and accepted by IHS when Indian health functions were moved out of BIA has been that persons of Indian descent are entitled to receive preference only in original appointment to positions in the Indian service.

During recent months this interpretation has been challenged on the basis that it does not reflect the full intent of the law. There are many who feel that a proper interpretation of the Indian preference law—which provides that Indians shall have “the preference to appointment to vacancies” in BIA and IHS—requires preference for Indians no matter how vacancies are filled, whether by original appointment, reinstatement, or promotion. The policy now being implemented in IHS and BIA reflects this broader interpretation.

The most recent of the Indian preference laws, the Indian Reorganization Act of 1934, initially authorized the Secretary of the Interior to implement the section of the act providing for Indian preference. In 1955, when responsibility for the Indian health program was trans-

ferred to the Public Health Service, comparable authority for carrying out Indian preference requirements was given to the Surgeon General of the Public Health Service, under the supervision of the Secretary of Health, Education, and Welfare. Therefore, the responsibility and authority to interpret and implement this law rest with Interior and HEW, rather than with our Commission.

We at the Commission have given this question considerable thought and study, however, because we are concerned about the interrelationship between the Indian preference statutes and the competitive service. Our judgment is that in stating their new policy the Departments have correctly interpreted the law and that on this basis preference for Indians in promotion selections is consistent with programs administered by the Commission.

I can understand your interest in the effect of the new policy on the non-Indian employees in these agencies. We have expressed to the Departments our concern for these employees who will suddenly find long-standing statutes interpreted differently. We have suggested that every effort be made to assure that these employees have an opportunity to fulfill their hopes and aspirations for the future. Although the legislation does not authorize us to regulate the application of Indian preference, we plan to work closely with agency officials to assist them in assuring that promotion programs carry out merit principles at the same time they are responsive to the Indian Reorganization Act.

I hope this information is helpful to you. If you have any additional questions, please do not hesitate to contact me.

Sincerely yours,

/s/ Robert E. Hampton
 ROBERT E. HAMPTON
 Chairman

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[SEAL]

In Reply Refer To:

[Jul. 3, 1972]

Memorandum

To: All Bureau Employees

From: Commissioner of Indian Affairs

Subject: Bureau Policy of Indian Preference

On June 23 Secretary Morton announced his approval of this Bureau's proposal to expand the application of Indian preference to include training and promotions, as well as initial employment and reinstatement. In regard to filling positions, the policy provides as follows: where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy.

The new policy has been endorsed by officials of the Civil Service Commission and the Department of the Interior in regard to its basis in Federal statute as well as its effect in furthering the cause of Indian self-determination. We are agreed that it is a proper part of the Bureau's mission. The expansion of Indian preference will basically be a means of enhancing opportunities for Indians in the operation and management of the Bureau's programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people.

At the same time, non-Indian employees are assured that this expansion of Indian preference in no way jeopardizes their present jobs or current status. It is not the intention of the Department or the Bureau to hamper the

rights of any employees, either Indian or non-Indian. This Bureau and the Indian people whom it serves will continue to need the talent, skill, and dedication which non-Indian employees have displayed over the years. Therefore, I stress our intention to maintain the rights of all employees and our desire for a continuation of each employee's best efforts in our important programs.

/s/ Louis R. Bruce
Commissioner

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P.D. Box 8327
Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-13
(300, 335, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual release. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will

be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

Unions: Mescalero

Jicarilla

AIS

National Council BIA Educators

OFFICE OF THE SECRETARY

For Release to PM's, June 23, 1972

INTERIOR EXPANDS POLICY OF INDIAN PREFERENCE IN BUREAU OF INDIAN AFFAIRS

Secretary of the Interior Rogers C. B. Morton today announced that he has approved recommendations of Bureau of Indian Affairs Commissioner Louis R. Bruce to extend the policy of Indian Preference to filling vacancies, whether by original appointment, reinstatement or promotion.

In addition, greater emphasis on training efforts will be directed toward the development of Indians. The changes will be effective immediately within the Bureau of Indian Affairs.

"A careful review of statutes covering Indian Preference has led us to the conclusion that our past practice of giving preference in the Bureau of Indian Affairs in cases of new hire and reduction in force should be extended to include the filling of all vacancies," Secretary Morton said.

Secretary Morton stressed that in the implementation of this new policy, careful attention will be given to protecting the rights of non-Indian employees to the greatest extent possible within statutory requirements.

The new policy is in support of President Nixon's program for Indians, and is designed to enable Indian personnel in the Bureau of Indian Affairs to progress as rapidly as their capabilities allow.

Implementing procedures are now being prepared by the Bureau of Indian Affairs.

Action:

Info:

Accounting Classification

Date Prepared

Type of Message

FOR INFORMATION CALL

☐ Single☐ Book☐ Multiple-Address

Name

Phone Number

This Space for Use of Communication Unit

MESSAGE TO BE TRANSMITTED
(Use double spacing and all capital letters)

Teletype Received: (June 26, 1972 @ 4:30 p.m. by lmc)

To: Walter O. Olson, Area Director

From: Louis R. Bruce, Commissioner, Washington, D.C.

The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows:

Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy.

[MAY 26, 1972]

Memorandum

To: Secretary of the Interior

From: Assistant Secretary-Management and Budget

Subject: Indian Preference Policy

The enclosed Indian preference policy recommended by Commissioner Bruce on September 23, and concurred in by Secretary Loesch on September 27, 1971, was discussed and considered by the Budget and Policy Committee on May 18.

The Committee recommends that you approve Commissioner Bruce's recommendations. We find the Commissioner's policy on Indian preference to be in support of the President's Indian policy.

/s/ Richard S. Bodwar

Enclosure

Approved: June 22, 1972

/s/ Rogers C. B. Morton
Secretary of the Interior

[September 27, 1971]

To: Secretary of the Interior

From: Assistant Secretary Loesch

Re: Indian Preference Policy

I have initialled the within memorandum, but this is a serious policy question for the Department and should be the subject of a briefing and discussion with you.

It is my view that participants in such a meeting should be you, Crow, Bruce, Rogers, Molich, Eitt, Pecora and myself.

/s/ [Illegible]

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[September 23, 1971]

Memorandum

To: Secretary of the Interior

Through: Assistant Secretary, Public Land Management

From: Commissioner of Indian Affairs

Subject: Indian Preference Policy

Indian preference is becoming a matter of ever increasing concern to the Bureau, its employees, and the Indian people. It has on several occasions been the basis for formal complaints of discrimination wherein complainants have alleged failure on the part of Bureau Management to comply with the intent of the Indian preference statutes. At least two suits against the Bureau and the Department have been filed in Federal Courts on this basis. The U.S. Public Health Service-Division of Indian Health has recently proposed changes in the interpretation and application of existent Indian preference policy. In addition, the Civil Service Commission has also shown an interest in the application of Indian preference statutes.

Indian preference is currently interpreted to apply to initial appointments and reinstatements only. In addition, the Bureau and the Department, with the concurrence of the Civil Service Commission, have administratively extended preference to reduction-in-force actions. The Bureau has recently undertaken a review of the legislative history of Indian preference in an effort to determine the validity of its present policy on the subject.

As a result of this review we believe that at the time the various statutes were enacted Congress intended that Indian preference be applicable to the filling of all vacancies in the Indian Service whether by initial appointment, promotion, or reinstatement. Accordingly, we have

developed the attached proposed policy statement which will establish revised policy in accordance with the original intent of the statutes.

In the Solicitor's review of our proposed policy we need to know which provisions of the proposed policy are mandatory and which are discretionary.

/s/ Louis R. Bruce
Commissioner

Enclosure

DEFENDANT'S EXHIBIT D

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Jul. 30, 1970]

My Fellow Employees:

I am deeply concerned about the reports I have received of poor morale in the Bureau. I understand this is in a large part caused by the impression that the Bureau no longer offers career opportunities for its employees. Indian employees feel that their opportunities are thwarted. Equally strong views are held by non-Indian employees who feel that opportunities for them have been eliminated or sharply curtailed. Unfortunately, statements and actions have contributed to these views.

I recognize the difficulty in convincing you that we do want, and intend to have, a personnel management program which provides opportunity for all employees, while giving special attention to responsibilities to Indians. With this objective in mind, I have issued instructions for a review of personnel policies and procedures to (1) place maximum attention on Indian preference in initial employment; (2) provide maximum training and development opportunities for all employees, while augmenting regular training resources to give special attention to needs of Indian employees; and (3) assure advancement opportunities on merit promotion principles, with safeguards to assure that this is achieved.

The success of our programs is directly dependent upon the efforts of each of you. I congratulate you on the remarkable job you have done, often under trying circumstances. I am proud of you. Please help us renew the confidence of all employees that the Bureau offers opportunities both for service and a career experience.

/s/ Louis R. Bruce
Commissioner

DEFENDANT'S EXHIBIT E

The following tables represent the number of Indians and non-Indians, classified by GS Grade and Wage Board level, employed by the BIA in November 1969:

<u>GS Grade</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
1	6	0	6
2	175	7	182
3	1,302	125	1,427
4	1,824	400	2,224
5	922	597	1,519
6	118	106	224
7	381	676	1,056
8	12	14	26
9	527	2,194	2,722
10	8	65	73
11	266	921	1,187
12	134	694	827
13	67	327	394
14	47	239	286
15	11	53	64
16	2	4	6
17	0	2	2
	<u>5,802</u>	<u>6,423</u>	<u>12,225</u>

<u>Wage Board</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
Less than \$5,000	68	8	76
\$ 5,000- 5,499	222	12	234
\$ 5,500- 5,999	359	22	381
\$ 6,000- 6,499	265	49	314
\$ 6,500- 6,999	424	60	484
\$ 7,000- 7,999	539	151	690
\$ 8,000- 8,999	381	201	582
\$ 9,000- 9,999	96	100	196
\$10,000-11,999	114	93	207
\$12,000-13,999	36	28	64
\$14,000-15,999	35	8	43
\$16,000-17,999	6	16	22
\$18,000-19,999	0	5	5
	<u>2,545</u>	<u>753</u>	<u>3,298</u>

Totals:

	<u>BIA Data</u>		<u>Total</u>
	<u>Inds.</u>	<u>Non-Ind.</u>	
GS Employees	5,802	6,423	12,225
Wage Board	2,545	753	3,298
	<u>8,347</u>	<u>7,176</u>	<u>15,523</u>

DEFENDANT'S EXHIBIT F

The following table represents the percentage of permanent Indian employees in the Bureau of Indian Affairs (BIA) in the years shown:

1941	51
1945	44
1946	56
1951	57
1952	53
1961	53
1962	53
1967	44
1969	48
1970	54

Name of Agency	Precedence	Security Classification
	Action:	
	Info:	
Accounting Classification	Date Prepared	Type of Message
FOR INFORMATION CALL		<input type="checkbox"/> Single
		<input type="checkbox"/> Book
Name	Phone Number	<input type="checkbox"/> Multiple-Address
This Space for Use of Communication Unit		

MESSAGE TO BE TRANSMITTED
(Use double spacing and all capital letters)

Teletype Received: (June 26, 1972 @ 4:30 p.m. by lmc)

To: Walter O. Olson, Area Director

From: Louis R. Bruce, Commissioner, Washington, D.C.

The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows:

Where two or more candidates who meet the established requirements are available for filing a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy.

DEFENDANT'S EXHIBIT G

FORM 5-4408
July 1969

PROMOTION CERTIFICATE

CERTIFICATION OF BEST QUALIFIED CANDIDATE

Announcement No. FAO 34-72 Date 09-26-72

Position Title and Grade Voucher Examining Supv.,
GS 0540-07

Installation, Activity and Location Div. of Financial Man-
agement, Albuquerque, N.M.

BEST qualified candidates, list in alphabetical order

BALENQUAH, CLIFFORD T.—Selected

INDIAN CANDIDATES

CARR, WALTER J.
CHERINO, JOHN S.
CLOUD, BARBARA B.
EUSTACE, ROBERT
FOSTER, RICHARD D.
MONTOKA, JOSEPHINE A.
ONDELACY, WILLIAM D.

Reason for Selection

Performance indicates this employee has the ability to succeed in this position. His experience and training provide the necessary background to insure he will perform as a supervisor in an exemplary manner. His communicative skills are above average which will be an asset in this position. It is obvious he gets along well with workers and is able to answer vendor inquiries to their satisfaction.

Release No. 44-148 6-26-69

/s/ [Illegible]

DEFENDANT'S EXHIBIT H

FORM 5-4408

July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 34-72 Date 09-26-72

Position Title and Grade Voucher Examining Supv.,
GS 0540-07Installation, Activity and Location Div. of Financial
Mgn., Albuq., N.M.

BEST qualified candidates, list in alphabetical order

DORCAS, ANNA M.—Inhouse Candidates

NON-INDIAN CANDIDATES

WORTEN, IRENE D.

DURAN, MAGDALENA C.—Outside Candidates

ROLLER, WANDA L.

Reason for Selection

Release No. 44-148 6-26-69

DEFENDANT'S EXHIBIT I

FORM 5-4408
July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 33-72 Date 09-26-72
Position Title and Grade Voucher Examining Supv.,
GS 0540-07

Installation, Activity and Location Div. of Financial
Mgn., Albuq., N.M.

BEST qualified candidates, list in alphabetical order

DORGAS, ANNA M.—Inhouse Candidates

NON-INDIAN CANDIDATES

WORTEN, IRENE D.

DURAN, MAGDALENA C.—Outside Candidates

ROLLER, WANDA L.

Reason for Selection

Release No. 44-148 6-26-69

DEFENDANT'S EXHIBIT J

FORM 5-4408

July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 33-72 Date 09-26-72

Position Title and Grade Voucher Examining Supv.,
GS 0540-07Installation, Activity and Location Div. of Financial
Mgn., Albuq., N.M.

BEST qualified candidates, list in alphabetical order

BALENQUAH, CLIFFORD T. INDIAN CANDIDATES

CARR, WALTER J.

CHERINO, JOHN S.

CLOUD, BARBARA B.

EUSTACE, ROBERT

FOSTER, RICHARD D.

MONTOKA, JOSEPHINE A.—Selected

ONDELACY, WILLIAM D.

Reason for Selection

This employee is a mature, dedicated and conscientious employee. I have observed her on an acting supervisory capacity and I believe with additional supervisory training she will make an above the average supervisor. Her experience qualifies her as a trained expert and she is able to communicate this knowledge to the field in a most satisfactory manner. She gets along well with co-workers especially those within her own [illegible].

Release No. 44-148 6-26-69

/s/ [Illegible]

DEFENDANT'S EXHIBIT K

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHWESTERN INDIAN POLYTECHNIC INSTITUTE
P. O. Box 10146—9169 Coors. N.W.
Albuquerque, New Mexico 87114

[November 21, 1972]

Memorandum

To: Area Director, Albuquerque Area Office
Attn: Mae S. Hall, Personnel Staffing & Employee Relations Specialist

From: Assistant Superintendent (Administration)

Subject: Visual Information Specialist GS-9 Position

On June 19, 1972, we advertised the position of Visual Information Specialist GS-1084-9, number E40.9749A with a cut off date of June 27, 1972.

Upon receipt of the Certificate of Eligibles by the Albuquerque Area Personnel Office, management at the Institute made a decision after evaluation of the staffing pattern in the Instructional Materials Center and availability of funds, it was our decision not to fill the position; therefore, we notified Area Personnel about our decision during the month of September.

/s/ James V. Pouhill
Assistant Superintendent
Administration

DEFENDANT'S EXHIBIT L

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
P. O. Box 8327
Albuquerque, New Mexico 87108

[August 11, 1972]

Memorandum

To: Superintendent, SIPI
From: Area Personnel Officer
Subject: Priority Referral Certificate

Maria B. Andronicos has rights to priority consideration as specified in FPM 335, Subchapter 4-3 C(2), and BIAM Personnel Management Letter No. 70-52 (335), dated August 12, 1970.

The above employee's application is enclosed for your review and special consideration.

Please indicate in the space provided whether you wish to select this employee for your position or to proceed with efforts to recruit.

- () It has been determined to select the above mentioned employee.
(x) Proceed with efforts to recruit.

/s/ Jack R. Anderson
Signature

08/11/72
Date

Acting Superintendent
Title

Enclosure

DEFENDANT'S EXHIBIT M

1-480

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

Washington, D.C.

November 20, 1972

Pursuant to Title 28, Section 1733, United States Code, I hereby Certify that each affixed paper is a true copy of a document comprising part of the official records of The Department of the Interior: Copy of Memorandum to Commissioner of Indians Affairs from Assistant Secretary-Management and Budget dated December 30, 1972 regarding Implementation of New Indian Preference Poli-

In TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed on the day and year first above written.

[SEAL]

Deputy Director of Management Operations

/s/ [Illegible]

**UNITED STATES DEPARTMENT
OF THE INTERIOR**

**OFFICE OF THE SECRETARY
Washington, D.C. 20240**

[Oct. 30, 1972]

Memorandum

To: Commissioner, Bureau of Indian Affairs
From: Assistant Secretary-Management and Budget
Subject: Implementation of New Indian Preference Policy

Your proposed procedures implementing the new policy extending Indian preference into promotions have been reviewed by this office. The attached procedures, which have been amended to conform to Departmental policy, are approved for implementation in the Bureau.

We understand the difficulties faced by your staff in developing these procedures. The new Indian preference policy and procedures will have a significant impact on employment practices in the Bureau. Their development has required a special sensitivity to this impact to insure the application of preference on an equitable basis within statutory limitations.

Training

Your covering memorandum of August 14 and the proposed procedures addresses the issue of preference in training. Although the policy statement approved by the Secretary on June 22, 1972, provided for greater emphasis on training for the development of Indian employees, it did not extend absolute preference into training. By letter dated July 5, 1972, Chairman Hampton of the Civil Service Commission endorsed our new Indian preference policy. We have since had discussions with members of the Commission staff and they point out that Chairman

Hampton's endorsement of our policy did not include an endorsement of preference in training.

Training will continue to be performed in accordance with Federal training policy and Chapter 41 of Title 5, USC, i.e., to meet the immediate and long-range needs of the agency. Any reference to Indian preference in training must be deleted from Bureau issuances.

Promotions, Reinstatements and Initial Appointments.

The statement of policy outlined in the Bureau's implementing procedures states in the last sentence, first paragraph: "Positions may be filled by transfers, reassignments, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in lateral transfer and reassignment before a Promotional Opportunity Bulletin is issued."

The policy statement approved by the Secretary extended Indian preference in to filling of vacancies by original appointment, reinstatement, and promotion. Transfers into the Bureau from other Federal agencies should be considered original appointments to the Bureau rolls and therefore subject to the same requirements as original appointments as far as Indian preference is concerned. The noncompetitive reassignment of employees within the Bureau was not covered by the policy statement. We believe that the application of Indian preference in lateral reassignment actions would restrict unnecessarily your authority to reassign employees as the needs of Bureau programs may dictate. Since the non-competitive lateral reassignment (actions which do not result in reassignment to a position with known promotional potential) would not place an employee in a better competitive position for advancement, preference would serve no useful purpose. Therefore, such actions should be exempt from the Indian preference requirements. However, there will be instances when an employee is reassigned to a position with known potential for advancement. In making a reassign-

ment of this nature, Indian preference must be applied, since a promotion would ultimately result. We have amended the approved procedures accordingly.

Keeping Employees Informed.

You proposed to provide a copy of the justification for selecting a non-Indian employee to each candidate or applicant who was not selected from a promotion certificate. It is our opinion that such action would have no value. In addition, Federal Merit Promotion Policy, contained in FPM Chapter 335, states that: "An employee is not entitled to see an appraisal of another employee." Since the justification for selecting a non-Indian employee for promotion would of necessity take the form of an evaluation or appraisal of his capabilities to perform in a particular position, such justification would be inappropriate for distribution to all candidates. We have deleted this statement from your procedures.

Exceptions to Indian Preference in Promotion.

Exceptions to the Indian preference policy are expected to be limited, according to the approved policy. It is contemplated that exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates that a decision not to select him will jeopardize the success of a program or project. We feel that it is important to all employees that the credibility of the Indian preference policy be maintained. Any exceptions will be subjected to close scrutiny by Indian and non-Indian employees alike. It is important, therefore, that the Commissioner grant exceptions only in instances which fully meet the stated requirement of the policy.

/s/ [Illegible]

Enclosure

I. Policy—An Indian has preference in initial appointment, including lateral transfer from outside the Bureau, reinstatement, and promotion. To be eligible for preference, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the qualification requirement are available for filling a vacancy, if one of them is an Indian, he shall be given the preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau. Positions may be filled by transfer, reassignment, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in reassignment within the Bureau.

The Promotion Program does not restrict the right of management to fill positions by methods other than through promotion.

All items remain the same except for I.

.12 Content of Announcement

I. The following statement will be included on each POB issued: "In filling this vacancy by promotion, initial appointment, lateral transfer from outside the Bureau, or reinstatement, priority in selection will be given to candidates who present proof of eligibility for Indian preference. A Certificate of Indian Blood must be part of the official personnel record of an applicant who claims Indian preference."

Items A, C, D, E, F, and G remain the same

.14 Methods and Procedures for Consideration.

B. Applications

An employee may file for an announced vacancy by submitting an SF-171 through supervisory channels to the appropriate job holding office. The supervisor will complete an evaluation form to attach to the application and forward it to the Personnel Office for submission to the job-holding Personnel Office.

An employee who claims Indian preference is responsible for submitting a Certificate of Indian Blood with his application if none is currently on record. Employees are responsible for submitting a CIB to the job-holding Personnel Office, if other than their current servicing Personnel Office. Indian preference in promotion will not be considered unless there is a CIB on file for the applicant claiming preference.

Items A & B are new—pen and ink changes renumbering old 17B to 17C; old 17C to 17D; and old 17D to 17E.

.17 Evaluating Eligible Candidates

All qualified candidates to be considered for a vacancy will be arranged in two groups—Indian and non-Indian.

A. Method of Evaluating. Candidates who are basically eligible will be evaluated on a combination of factors dealing with their overall knowledge, skills, education, and experience. Rating panels will be established, unless it is impracticable to do so, in order to rate candidates for positions at GS-5 and above under the Promotion Plan. When rating panels are used in the evaluation process, personnel staff members and the selecting official may serve only in a technical or advisory capacity.

B. Evaluation of Outside Candidates. When recruitment efforts are extended to include applications

from candidates outside the Federal service and other Federal agencies, these applications will be rated, ranked, and certified in the same manner as Bureau employees applying for consideration. When written evaluations are not available, telephone contacts with former or present employers will be documented as the supervisor's evaluation.

This paragraph will supersede entire paragraph .18

.18 Ranking and Selection

A. Ranking by Category

1. Indian candidates. All Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

2. Non-Indian Candidates. All non-Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

B. Referral of Candidates to Selection Official (Certification)

1. Three to 5 of the best qualified Indian candidates will be listed on the certificate. If meaningful distinctions cannot be made among the best qualified candidates as many as 10 names may be certified.

2. Where there are no best qualified Indian candidates available, 3 to 5 of the best qualified non-Indian candidates will be certified together with

all qualified Indian candidates. Consideration of non-Indians will not be made until all qualified Indians have been considered. Selection of a best qualified non-Indian candidate, when there are qualified Indian candidates on the certificate, will require approval by the Commissioner as an exception to the Indian preference policy.

- C. Exceptions. Requests for approval of the selection of a non-Indian will be submitted to the Commissioner. Exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates in relation to job requirements, including any special needs, that a decision not to select him will jeopardize the success of a program or project.

1. Justification for Exception. A complete justification of why the selected non-Indian has superior qualification to the qualified Indian shall be submitted to the Washington Office together with the certificate of eligibles, applications, and supervisors evaluations.

CERTIFICATE OF ELIGIBLES

BEST QUALIFIED INDIAN CANDIDATES

QUALIFIED INDIAN CANDIDATES (may not be selected when best qualified Indians are available)

BEST QUALIFIED NON-INDIAN CANDIDATES (The selection on a non-Indian candidate is subject to approval by the Commissioner if there are qualified or best qualified Indian candidates available)

Selecting Official

[2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THREE JUDGE CASE

Case No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS,

—vs—

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS.

APPEARANCES

For the Plaintiffs:

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LOTARIO D. ORTEGA
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Albuquerque, New Mexico

[3]

For the Intervenor, Amerind:

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Box 116

Crownpoint, New Mexico 87313

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled and numbered cause came on for Final Hearing on the Merits before the HONORABLE OLIVER SETH, United States Circuit Judge; HONORABLE HOWARD C. BRATTON, United States District Judge; and HONORABLE EDWIN L. MECHEM, United States District Judge, at Albuquerque, New Mexico on the 29th day of November, 1972, at 9:00 o'clock A.M.;

That the Plaintiffs appeared in person and by their attorney of record, as set forth above;

That the Defendants appeared by their attorney of record, as set forth above, and the following proceedings were had:

NOTE: Unless otherwise indicated, the "Court" refers to Judge Seth.

[i]

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[iii]

EXHIBITS

PLAINTIFFS' EXHIBITS

	MARKED	OFFERED	ADMITTED
No. 10—Total of Promotions		82	83
11—Vacancy Announcement	6	9	10
12—Newsletter (1st page)	8	10	10
13—POB		50	50
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[4] THE COURT: Good morning. We will hear the Mancari versus Morton case. Are the parties ready this morning?

MR. KULIKOWSKI: The Plaintiff is ready, Your Honor.

MR. SHERMAN: Your Honor, the Intervenor is ready.

THE COURT: You may proceed.

MR. KULIKOWSKI: May it please the Court, Plaintiffs would like to make a very brief opening statement at this time.

If the Court please, my name is John Kulikowski, I am an attorney for the Plaintiffs in this class action suit. Your Honor, in the sake of saving time and in view of the fact that this matter was heard at a Motion for Preliminary Injunction, we feel that a good deal of time can be saved because of the fact that a good deal of evidence is already before the Court as a result of that hearing.

For the most part in this case, the factual matters are not in great contention. The parties agree on a good many things. The Plaintiffs wish to call a series of witnesses centering around four incidents. Our purpose for calling these witnesses will be to show two things. First of all, to show that the policy has been implemented on a broad scale, and secondly, that the policy, as implemented, has caused harm to the members of the class which the Plaintiffs represent.

As an incidental matter we might mention that the exhibits today will be numbered consecutively, taking over where the numbers left off at the Preliminary Injunction.

[5] THE COURT: Do you wish to make any statement, Mr. Ortega?

MR. ORTEGA: Not at this time, Your Honor.

THE COURT: Very well, you may proceed, counsel.

MR. KULIKOWSKI: The Plaintiffs would like to call Miss Nancy Johnson.

NANCY JOHNSON

a witness, having been first duly sworn according to law, upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?

A Nancy Johnson.

Q Where are you employed, Miss Johnson?

A The Bureau of Indian Affairs, I.D.C.

Q What is an I.D.C., for the record?

A That's the Indian Affairs Data Center.

Q How long have you been with the Bureau of Indian Affairs?

A It will be six years this coming February.

Q Are you familiar with the new Indian Preference Policy that was announced this past June?

A Yes, I am.

Q Do you qualify for the Indian Preference yourself?

A No, I did not.

Q Miss Johnson, did you have opportunity to apply for a [6] position or a vacancy entitled Computer Systems Analyst GS-334-9.

A Yes, I did.

Q When was that that you applied for that?

A Sometime in April.

Q Of 1972?

A Of 1972.

(Whereupon, Plaintiffs' Exhibit No. 11 was marked for identification.)

Q I hand you something marked Plaintiffs' Exhibit Number 11, which is a vacancy announcement, and ask you if you recognize that announcement.

A Yes, I do.

Q Was this the vacancy for which you applied for the Computer Systems Analyst position?

A That is correct.

Q Did you receive that promotion or did you fill that vacancy?

A No, I didn't.

Q What grade level would that position have been?

A GS-9.

Q What was your GS rating at the time?

A At the time my GS rating was a GS-5.

Q What was the outcome of your application?

A They had recalled all the certificates after the new [7] Indian policy was put through.

Q Was your name contained on a certification that came out subsequent to the POB being issued?

A Yes, it was.

Q Do you recall when that was?

A Oh, may I—

Q Certainly?

A Would you restate that again? Prior to the POB or subsequent?

Q No, subsequent.

A Oh, subsequent. Yes, it was.

Q Do you recall when that certificate came out?

A I believe it was 5-26 was the first certificate.

Q So that would be May 26th of 1972?

A That is correct, yes.

Q Was your name listed in any particular way on that certificate?

A Eligible for promotion.

Q Did the policy announcement have any impact on the action taken on this certificate, to the best of your knowledge?

A Yes. They recalled the certificate.

Q Would you tell us the events and what you know personally about that incident?

A Well, I guess the first knowledge I had is when it came out in our weekly newsletter. Well, the first [8] knowledge was when Secretary Morton had released his new Indian policy, shortly after that in the newsletter the Personnel Department announced they were recalling all certificates. I was very concerned because

I was a non-Indian, I had been interviewed and I was very concerned. This did affect me. So, therefore, I went to my EEO counselor and started questioning this.

Q Who was that counselor?

A Tony Franco.

(Whereupon, Plaintiffs' Exhibit No. 12 was marked for identification.)

MR. ORTEGA: Your Honor, in the interest of saving time with respect to this type of testimony, we have admitted in our Answer that we have implemented this new policy. I don't think there's a factual case or issue about all this.

THE COURT: I think they're probably entitled to put on evidence if they wish, if it is limited and not cumulative.

MR. KULIKOWSKI: Yes, Your Honor, we will make every effort to avoid duplication or cumulation of evidence. I think the big issue that the Defendants and Plaintiffs are at issue over is whether harm was caused. We feel in attempting to show that, we have to lay some foundation as to the background that led up to it.

Q (By Mr. Kulikowski) Miss Johnson, I hand you something [9] marked Plaintiffs' Exhibit Number 12 and ask you if you recognize that particular exhibit.

A Number 12?

Q Yes.

A Yes, I do.

Q Is this the newsletter you referred to?

A That is correct.

Q And this is the newsletter that put you on notice that the certificates were being recalled?

A That is correct.

Q After you approached your EEO counselor, what was the result of your contact with him?

A By "result," do you mean we had the meetings, if that's what you are referring to?

Q What was the outcome or the result of those meetings?

A Well, they had recalled the certificates. They had reissued a new certificate.

Q Did your name appear on that new certificate?

A Yes, it did.

Q Were there any names that appeared on that new certificate that were not on the first certificate?

A Correct.

MR. KULIKOWSKI: Your Honor, at this time we would move the admission of Plaintiffs' Exhibits 11 and 12, the POB and the newsletter.

[10] MR. ORTEGA: May I see 12, Your Honor?

MR. KULIKOWSKI: Your Honor, I would like to modify that offer of documentation. It seems that the first page just appeared on the exhibits listed to the counsel and the Court, and we would just move the admission of the first page of Exhibit 12.

MR. SHERMAN: Amerind has no objection to the admission of Exhibits 11 and 12.

MR. ORTEGA: We have no objection at this time. However, we will have testimony on it. I think there's an inaccuracy in Exhibit 12.

THE COURT: They will be admitted.

(Whereupon, Plaintiffs' Exhibits 11 and 12 were admitted in evidence.)

MR. KULIKOWSKI: Your Honor, I have no further questions of this witness at this time.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mrs. Johnson, you have been with the Bureau of Indian Affairs six years, is that correct?

A It will be six years.

Q At the time that you applied for this promotion you were a GS-5, I believe you said?

A That is correct.

Q Are you still a GS-5?

[11] A That's correct.

Q And this promotion would have been to a GS-9 position?

A That is correct.

Q What, actually, is your job at this time?

A Actually I'm a, I guess a computer technician.

Q In that connection, what do you do?

A We prepare data for input into the computer.

Q Have you been doing this type of work with the Bureau for six years?

A No.

Q You have had other jobs?

A Yes.

Q With the Bureau of Indian Affairs? What other work have you done with the Bureau?

A I was actually a computer operator. I had taken a downgrade prior to this POB about last February.

Q And a POB is a Promotion Opportunity Bulletin, is that correct?

A That is correct.

Q You say you took a downgrade from what?

A From a GS-7.

Q From a GS-7 to a GS-5?

A Yes.

Q Why was that?

A Well, because of my daughter. In the computer room we [12] work rotating shift and in order to work a straight day shift, in order to get a straight day—

Q For personal reasons?

A That is correct.

Q You cannot do the work in this other position?

A Because of the hours, yes.

Q So you have, I take it then, GS-7 is the highest level that you have achieved—

A Yes.

Q —in Government service? You are under Civil Service, are you not?

A That is correct.

Q And under Civil Service it's possible for you to transfer to other agencies if positions exist, that's correct?

A That is correct.

MR. ORTEGA: That's all I have.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mrs. Johnson, just a few brief questions. Relating to this first certification sheet that your name appeared on, do you know precisely how you were ranked? Were you ranked as Qualified or Best Qualified on that sheet? Do you remember?

A Oh, I am not really sure. I imagine it would be, in order to be certified you would have to be Highly Qualified.

[13] Q Were any other names on that certificate?

A Yes, there were.

Q Were any of these persons Indian?

A I don't know about the people from the Registrar, I really don't.

Q So you are not certain?

A I am really not certain.

Q You are not certain whether any of the other persons on that certification sheet had qualifications which were equal to or better than yours?

A No, I can't actually say.

Q Do you know what the Excepted Service is within the Bureau of Indian Affairs?

A Yes.

Q Can you briefly explain that?

A Well, to my understanding, maybe I am not too clear on it, if you are of Indian blood you are accepted into the Bureau.

Q Does one in the Excepted Service have to meet the same qualifications as one who has Civil Service status? Are the same requirements necessary? If you don't know simply state.

A Yes. I am not clear on that.

Q Your present position of computer technician, how long have you been in that position?

[14] A I believe since February of '72.

Q Was this particular application for this new job the first attempt that you had made to be promoted from that position?

A Yes.

Q So you had made no other attempts prior to this time?

A No.

MR. SHERMAN: I have no further questions, Your Honor.

MR. KULIKOWSKI: Nothing further.

THE COURT: You may be excused.

MR. KULIKOWSKI: The Plaintiff at this time would like to call Mr. Anthony Franco to the stand.

ANTHONY FRANCO

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, to the Court?

A Anthony Franco.

Q By whom are you employed and where do you work?

A Indian Affairs Data Center. I am a computer operator.

Q Are you also an EEO counselor, Equal Employment Opportunity counselor?

A Yes.

[15] Q What does that job entail, briefly?

A I act as a mediator between the employees and management.

Q In that capacity, did you have an opportunity to investigate a complaint from Miss Nancy Johnson?

A Yes, I did.

Q Do you recall when that was, Mr. Franco?

A Well, she came to me as soon as the Indian Preference Policy was out, June 23rd.

Q What was the nature of her complaint to you?

A She wanted to know how she would stand applying for this Systems Analyst's position. She wanted to know if she would be affected by it.

Q Did you investigate that, and with whom?

A Yes, I did. I met with Mr. McMullen on the, I believe it was the same day, the 23rd.

Q Were you able to gain any answers to Miss Johnson's questions?

A Yes. He said that the POB's and the certificates would be pulled back and reissued in order that these people would have, that the individual preference policy would be applied.

Q Even before the POB's and the Preference certificates were announced?

A Yes.

Q Was that your only meeting with Mr. McMullen in regard [16] to this incident involving Mrs. Johnson?

A I met with him sometime later concerning the decision by the Manpower Board on these six positions for System Analysis.

Q What was the decision of that Manpower Board?

A They decided to go ahead and select four GS-9 Analysts and two at the trainee level, which would be the 5-7, I believe.

Q Do you know how many of those six qualified for Indian Preference, if you know?

A I don't know.

MR. KULIKOWSKI: I have no further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q I am not sure what six positions you are talking about. Were these six positions that Promotional Opportunity Bulletins had been issued prior to the effective date of the new Indian Preference Policy?

A Right.

Q On or about the day that the policy went into effect, as I understand it, you met with Mr. Carl McMullen, who is a personnel officer?

A Yes.

Q And he indicated that these would be pulled back, is that [17] correct?

A Right.

Q Now,—

A This was on the day of the Indian Preference Policy, when it was issued.

Q When it was issued?

A Right.

Q Something happened after this, something with reference to a Manpower Board?

A Yes. They had received a TWIX from Washington saying that positions that they had sent for Manpower Board's approval would be at the four positions for the 9 level and two positions for the 5/7 level.

Q Were these filled in accordance with a new policy, or not?

A Well, yes, they were.

Q They were?

A Yes.

Q But you don't know whether or not all were filled by Indian candidates?

A I believe they were.

Q They were?

A Yes.

Q What is your GS level, Mr. Franco?

A Seven.

MR. ORTEGA: That's all I have.

[18] MR. SHERMAN: No questions.

THE COURT: Do you have anything further?

MR. KULIKOWSKI: Nothing further, Your Honor.

THE COURT: You may step down, Mr. Franco.

MR. KULIKOWSKI: Plaintiffs would like to call Mr. Carl McMullen to the stand.

CARL McMULLEN

a witness, having been first duly sworn according to law, upon his oath testified as follows:-

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

A Carl McMullen.

Q By whom are you employed?

A The Bureau of Indian Affairs.

Q What is your position with the Bureau of Indian Affairs?

A Personnel Officer and ex-chief of the Fifth Support Service Office.

Q Does your supervision of your job include personnel services to IADC?

A Yes, it does.

Q Mr. McMullen, were you present in the courtroom this morning during the testimony of Miss Johnson and Mr. Franco?

A Yes.

[19] Q Did you, in the performance of your official duties, have the opportunity to oversee the vacancies, the POB for a GS-334-9?

A May I see the exhibits? I can't remember every action that comes through my office.

Yes, sir.

Q Were certificates issued in the wake of this POB, to the best of your knowledge?

A Yes.

Q Was there a POB issued on or about May 26th, 1972?

A A POB?

Q I am sorry, a certificate.

A I don't know exactly if that's the correct date or not without having the file available.

Q Do you recall that a certificate was issued before the new policy was announced?

A Yes.

Q Do you recall if Miss Nancy Johnson's name was on that certificate?

A I could not swear for sure. She said it was, I assume that she's correct.

Q Were you instructed, in your official capacity, to implement the new Indian Preference Policy?

A Yes, sir.

Q In performance of those duties, did you have the [20] opportunity to recall the POB marked Plaintiffs' Exhibit Number 11?

A Could I have the exhibits?

Q I believe you do. The POB—

MR. ORTEGA: All the witness has before him is the one Promotional Opportunity Bulletin. I would ask that Counsel provide him with all the certificates and what we are talking about here.

THE COURT: I think Exhibit 11 was admitted this morning, was it not?

A The one I have before me, Exhibit 11, is the POB, Promotional Opportunity Bulletin. I think you are talking about a certificate which is something entirely different, and I don't have that with me.

Q Did you give instructions in the official performance of your duty to recall the POB and reissue it?

A I would have to check my files that are in the office on it. I can't remember exactly if this is the reason why I recalled it, on or about that time there was a certificate issued that was issued in error that had nothing to do with Indian Preference. It was recalled, and I think that was the case, but I am not sure. If so, that's in the deposition of the testimony that was given prior to the Hearing on the Injunction.

Q But is it—

[21] A Is this the same case we are talking about.

Q Yes, the certificate on or about the 26th of May, which we have referred to earlier.

A Yes.

Q That was recalled because of irregularities?

A Yes, sir.

Q Do you recall what type of irregularities?

A Yes, I recall that the qualification requirement of the individuals on the certificate and some had been omitted that should have been on it so it was recalled for that purpose rather than solely for Indian Preference.

Q Was the POB that you have in front of you, the Promotional Opportunity Bulletin, was that ordered recalled by yourself or anyone in your office?

A I can't answer this without consulting my record. This has been May, June, there has been so many actions gone through I can't recall it specifically. Had I known what the question was going to be, I could have prepared myself for this specific question that you are asking.

Q Mr. McMullen, after the new policy was announced, did you have opportunity to advise the executive officer at the Data Center that POB's and certificates would be recalled because of the new Indian Preference Policy?

A Yes.

Q But it's your testimony that the certificate we've [22] referred to, which Miss Johnson's name appeared thereon, is not one of those certificates?

A No, it is not, correct. It could well have been that. But in addition to Indian Preference, it was recalled for other reasons, irregularities, errors made in judging qualifications of people who had applied for the position.

Q Were these positions that were advertised, that we're discussing, were these filled subsequently?

A Some of them were, I'm not sure without consulting the records that all of them were.

Q From your recollection, do you recall if these positions were filled with any individuals qualifying for Indian Preference?

A I believe they were.

Q Do you know how many of the slots?

A I can't tell you right now.

Q By recalling the certificates, as you've testified, in conjunction with notifying the executive officer, this would

have applied to POB's and certificates issued prior to June 23rd of 1972 before the policy was announced?

A It could have.

MR. KULIKOWSKI: I have no further questions of Mr. McMullen.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. McMullen, let me just be clear on this, you are saying [23] that, as I take it, POB's may have been issued prior to June 23rd but no decision had been made as to persons selected to those positions by June 23rd, is that correct?

A Yes, sir.

Q So, in other words, nobody's job was taken away from them because of the Indian Preference Policy?

A No, sir.

MR. SHERMAN: No further questions.

MR. ORTEGA: I have one question, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. McMullen, just out of curiosity, do you qualify for the Indian Preference?

A No, sir.

MR. ORTEGA: That's all.

MR. KULIKOWSKI: I have no further questions of Mr. McMullen.

THE COURT: He may step down.

MR. KULIKOWSKI: The Plaintiffs would call Mrs. Anna Marie Dorcas to the stand.

ANNA MARIE DORCAS

a witness, having been first duly sworn according to law, upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

[24] A Anna Marie Dorcas.

Q By whom are you employed, Mrs. Dorcas?

A By the Bureau of Indian Affairs, Division of Financial Management Disbursements.

Q That's located here in Albuquerque?

A Yes.

Q How long have you been with the Indian Affairs?

A Thirteen years and two months.

Q How long have you worked in the Data, Electronic Data Computing area?

A I'm sorry, I work in Disbursements, that's the vouchers section, and I have worked with them since 1964 in that particular section of the Bureau.

Q Here in Albuquerque?

A No, part of my experience was in Gallup at the Navajo Area Office.

Q Did you at any time during that six-years' experience have opportunity to serve as a voucher-examining supervisor?

A Yes, I did. In 1967 to, oh, about 1968. It might have been '69, maybe, about a year and a half.

Q Did you have opportunity to apply for a position as a voucher-examining supervisor within the past four or five months?

A Yes, it was—the announcement of who was selected was [25] made in September so it might have been August when I applied for it, August of '72.

Q Miss Dorcas, what is your present GS rating?

A I am a voucher examiner, GS-5.

Q What would have been the GS rating on the voucher-examining supervisor slot that you applied for?

A That's a GS-7.

Q Do you qualify for the Indian Preference that is the subject of this lawsuit?

A I do not.

Q Did you receive this promotion to GS-7?

A I did not.

Q Did you have any opportunity to investigate why the promotion was not received by you?

A Well, we were given the opportunity to talk to our chief as to why we did not get the job.

Q Who was that individual?

A John Arkansas.

Q What was the result of your inquiry?

A Well, I went in to see him on September 30th. I went in briefly. It was a friendly conversation and he started out with the fact, he said, "I suppose you want to talk about the 7. You realize this puts me in a very difficult position because you, of course, know about the new Indian Preference Policy—

[26] MR. SHERMAN: I am going to object to this testimony.

THE COURT: Sustained.

MR. SHERMAN: It's all hearsay.

THE COURT: The objection is sustained.

Q (By Mr. Kulikowski) Miss Dorcas, do you know whether Mr. Arkansas was the selecting officer for this position?

A Yes. We have a GS-9 position in our office and he, himself, which is filled by Bob Carswell, and Mr. Arkansas, to the other, selected the person.

Q Do you know whether your official personnel file was considered in making this promotion?

A I questioned it and I was informed that my qualifications were not reviewed.

MR. SHERMAN: I object to that.

THE COURT: What's the objection, counselor?

MR. SHERMAN: I think this is all hearsay.

THE COURT: She's testifying, I believe, counsel, as to what she knows personally. The objection is overruled.

Q (By Mr. Kulikowski) Do you know whether your experience as a voucher-examining supervisor was considered for your promotion?

A I spoke to both persons and they both informed me that my qualifications were not reviewed.

MR. KULIKOWSKI: We have no further questions at this time, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mrs. Dorcas, do you know the name of the person who filled the vacancy?

A There were two vacancies, one was filled by Josephine Montoya and one by Clifford Balenquah.

Q And Clifford Balenquah?

A Balenquah.

Q And both of those people qualify for the Indian Preference, do they not?

A That is correct.

Q And you do not, as I understand it?

A No, I don't.

Q Both of those people are well qualified, are they not?

A I would say yes, but unless you review my qualifications along with theirs you wouldn't know.

Q In your judgment, having worked in the same area, both of these people are well qualified, are they not?

A Right.

MR. ORTEGA: That's all I have.

MR. SHERMAN: I have no questions.

MR. KULIKOWSKI: No further questions of this witness.

I would like to call Mr. John Arkansas.

THE COURT: You may be excused.

[28]

JOHN ARKANSAS

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?

A John Phillip Arkansas.

Q By whom are you employed and what is your position?

A Bureau of Indian Affairs, Division of Financial Management Disbursement Section.

Q Did you hear the testimony early this morning of Mrs. Anna Marie Dorcas?

A I did.

Q Were you the selecting officer for the position that was referred to as a voucher-examining supervisor?

A I was.

Q Did you make that selection to fill that vacancy?

A Yes.

Q How many vacancies were filled?

A Two.

Q Who were the individuals that filled those vacancies?

A Josephine Montoya and Cliff Balenquah.

Q Do you know whether either of these two individuals qualify for the Indian Preference?

A They do.

[29] Q Did you have opportunity to meet with Mrs. Anna Marie Dorcas after the selections were made by yourself?

A Yes.

Q On what basis did you evaluate her qualifications for this vacancy?

A The certificates speak for themselves. All people that were certified to me for those two vacancies were qualified for the job. So, as far as selecting the two people that I did, they came from the certificate of eight people, so there were seven other Indians on that one certificate.

Q Is it a fair statement to say that you received, in essence, two certificates, one with Indian candidates and one with non-Indian candidates?

A That's right.

Q And your selections were made from the Indian candidate list, is that correct?

A Yes.

Q With regard to the non-Indian candidate list, did you consider any of the qualifications or the personnel files of those individuals in making your selections?

A No, sir.

Q Why did you not do that?

A Because I had another list with eight qualified people on it.

[30] Q Did the Indian Preference Policy play any role in this?

A Yes.

Q Mr. Arkansas, what two slots would have been filled, could you state that for us?

A Well, they were unit supervisors, they were GS-7's.

Q What is, briefly, the nature of the work involved in those two vacancies?

A Well, they supervise a unit consisting of approximately seven other voucher examiners. There was one in travel which deals with travel, and there was one in our research unit. So they were supervisory positions.

Q What is involved in voucher examining, could you briefly tell us for those of us who are laymen?

A Well, we have people who examine the voucher package that comes in to us from the various stations, the package consists of a voucher, a receiving report and a code sheet which contains the accounting information.

Q Are you familiar with the work being performed by these individuals that would have filled these vacancies?

A Yes.

Q How long have you been working with the B.I.A. in this area of voucher examining or supervising?

A With the BIA, seventeen months.

Q And any prior experience to that?

A In vouchering?

[31] Q Yes.

A Three years with the U.S. Forest Service.

Q What is your GS rating at this time, Mr. Arkansas?

A I am a GS-12.

Q Based on your experience in voucher examining and this line of work, both in and outside the BIA, is there

any reason why an Indian individual is better qualified to perform voucher examining work as opposed to a non-Indian?

MR. ORTEGA: I object to that. That's irrelevant and has no—

THE COURT: I think it's within the issues, counselor.

A Let me see if I understand. In my opinion, is there some reason why Indians are more qualified to perform vouchering duties?

Q (By Mr. Kulikowski) Because of the racial background?

A No.

MR. KULIKOWSKI: No further questions of this witness.

MR. ORTEGA: Could I have these marked as Defendants' exhibits?

(Whereupon, Defendants' Exhibits G, H, I & J were marked for identification.)

CROSS-EXAMINATION

BY MR. VICTOR ORTEGA:

Q Mr. Arkansas, I'll show you what has been marked as [32] Defendants' Exhibits G and H. Are these two of the certificates on one of these positions that you just testified about?

A Yes.

Q And the G is the certificate with the Indian candidates?

A Yes.

Q And H is the certificate with the non-Indian candidates?

A Yes, sir.

Q From that one you selected Clifford Balenquah, is that correct?

A Yes, sir.

Q I'll show you Defendants' Exhibits I and J; are these the other two certificates, Indian and non-Indian candidates that you just testified to?

A Yes, sir.

Q And this is your handwriting appearing on the bottom of Defendants' Exhibits G and J, is that correct?

A Yes.

Q And from J you selected, did you not, Josephine A. Montoya?

A Yes.

MR. ORTEGA: We'll offer at this time Defendants' Exhibits G, H, I and J.

MR. KULIKOWSKI: The Plaintiffs have no objection.

THE COURT: They will be admitted.

(Whereupon, Defendants' Exhibits G, H, I and J were offered and admitted in evidence.)

[33] MR. ORTEGA: One other question.

Q (By Mr. Ortega) On the certificates themselves, in each case they contain wording, do they not have "Best Qualified" in each case, is that correct?

A Yes, they do.

Q And this is true as to both the Indian and the non-Indian candidates?

A Yes.

Q Mr. Arkansas, how long have you worked for the United States government?

A Over ten years. Ten years, six months, approximately.

Q Are you in the Excepted Service?

A I am not.

Q Civil Service?

A Competitive.

Q Competitive. Originally, where are you from, what part of the country?

A North Carolina.

MR. ORTEGA: Thank you.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Arkansas, on the certificate dealing with these two positions, I presume every Indian applicant who is

listed for those positions on the certificate was categorized as, quote, "Best Qualified," is that correct?

[34] A Yes.

Q So no Indian applicants' names appear who was, quote, "Best Qualified"?

A That's right.

Q Would the Indian Preference Policy apply in any case, assuming there were no qualified Indian applicants? Would you implement the Indian Preference Policy if the Indian applicant was not qualified?

A No, I couldn't.

Q The applicant must be qualified?

A Right. Must appear on the certificate.

Q In these two particular positions that you are discussing, were there certain supervisory responsibilities that went with the position?

A There were.

Q Can you tell us what kind of supervisory responsibilities these were? Did this involve the supervision of other employees?

A Yes, these are unit supervisors. There are six units within the office and these are two of them.

Q Generally what grade levels are involved in supervising other employees?

A Well, in this particular instance, GS-7's, but supervisors can be lower or higher grades.

Q But these particular positions involved the supervision [35] of other GS-7 employees?

A No. They involved the supervision of GS-5 employees and GS-6 employees.

Q Are most GS-5 and GS-6 employees at this office Indian or non-Indian?

A A majority are Indian.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: I have just a few, if the Court please.

REDIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Mr. Arkansas, do you qualify, yourself, for the Indian Preference?

A I do.

Q In making your selections off of the certifications of Indian candidates, did you consider their experience and their personnel files?

A The Indian candidates?

Q Yes, sir.

A Yes, sir.

Q But you did not consider the personnel files or the experience of the non-Indian candidates?

A No.

Q Did you interview any of the candidates involved?

A No.

[36] Q So it is safe to say that as long as there were qualified Indians on the Indian candidate list, your selection was made from that without giving any consideration to the non-Indian candidates?

A Yes.

MR. KULIKOWSKI: No further questions.

THE COURT: Anything further? Thank you, Mr. Arkansas.

MR. KULIKOWSKI: May the Court please, in the order of saving time, perhaps we could have some of the witnesses that have already testified be excused by the Court unless there are any objections.

MR. ORTEGA: We have no objection. We would like Mr. McMullen to remain from our standpoint, but no objection as to the others.

THE COURT: I don't understand.

MR. ORTEGA: Your Honor, Mr. McMullen was asked to be in Court at our request.

THE COURT: You have no objection to excusing the witnesses who have already testified, is that correct?

MR. ORTEGA: That's correct.

THE COURT: Do you, Mr. Sherman?

MR. SHERMAN: No, we have no objection.

THE COURT: They may be excused.

MR. KULIKOWSKI: I would like to call Mr. Ray Brown [37] to the stand if he is present.

RAY BROWN

a witness, having been first duly sworn according to law upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

A Ray Brown.

Q By whom are you employed and what is your position?

A The Bureau of Indian Affairs at the Southwestern Indian Polytechnic Institute.

Q What is your job out there at the Institute?

A My official position description is Educational Specialist, Reading Laboratory, GS-9.

Q Did you, within the past year to year and a half, apply for a position entitled Education Specialist IMC, GS-11 grade?

A Yes, I did.

Q What was the result of that application?

A On September 23rd, 1971, I was informed by my supervisor, Mr. Jim Felts, who is Director of the Instructional Material Center, that I had been selected for this position and I started working in this position at that time.

Q To your knowledge, does that position require approval [38] of the School Board out at SIPI?

A Yes, it does.

Q What is the composition of this School Board?

A It's an all Indian School Board.

Q It is part of their official duties to approve vacancies and promotions that are filled out at SIPI?

A Yes.

Q Was yours so considered by the Board?

A Yes, it was.

Q Did your filling that vacancy meet with their approval?

A Yes, it did.

Q In September of '71 you commenced serving in this capacity as an Education Specialist IMC GS-11?

A Yes, I did.

Q How long did you serve in that capacity?

A Until June of 1972.

Q Are you still, at this time, serving in that capacity?

A No, I am not.

Q Would you relate the incident or how it came about that you were no longer serving in that capacity as a GS-11?

A After I had been informed by my supervisor, and about six weeks after I had been informed that I had been selected for this position and was already in the position, serving in the position, I inquired as to why I had not received notification of personnel action and I was told [39] that there was a freeze and it was being held up because of this, because of the freeze, and then in June, after the Indian Preference Policy came out in June, then Mr. Jack Anderson, who is Assistant Superintendent for Instruction in SIPI, informed me that some time back that the position had actually been abolished and that with the implementation of the Indian Preference Policy, that there was no longer any hope of this position.

Q Did you receive any notification to that effect in the form of a letter or document, or anything of this nature?

A No, not officially.

Q Let me show you something marked Plaintiffs' Exhibit Number 17 and ask you if you recognize that, Mr. Brown.

A Yes, I do.

Q What role does that particular document play in the occurrences that you have just testified to?

A This was a memo from Mr. Jack Anderson, Assistant Superintendent for Instruction, designating me as officially acting coordinator of IMC in the GS-11 position.

Q To your knowledge, will this job be reopened and readvertised?

A I don't know. I have no way of knowing.

MR. KULIKOWSKI: We would move at this time, Your Honor, the admission of Plaintiffs' Exhibit 17.

(Whereupon, Plaintiffs' Exhibit No. 17 was offered in evidence.)

[40] **MR. ORTEGA:** No objection, Your Honor.

MR. SHERMAN: No objection.

THE COURT: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 17 was admitted in evidence.)

Q (By Mr. Kulikowski) Mr. Brown, do you qualify for the Indian Preference?

A No, I do not.

Q How long have you been with the Indian Affairs?

A It was five years this past July.

Q What is your experience during that five-year period, what type of positions have you held?

A I was a teacher in the Eastern Navajo Agency in Crownpoint, New Mexico. I served as Coordinator of the Title One Remedial Reading Program for one year and a half before coming to SIPI.

Q What is the nature of your duties out at SIPI at this time?

A My position description is presently being rewritten. It is not complete yet. But I am acting as Supervisor of the Media Section at the present time.

Q What is the GS rating at that position?

A GS-9.

Q And you have never received the promotion to the GS-11 that you have testified to?

A No, I did not.

[41] **MR. KULIKOWSKI:** No further questions.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Brown, what is your educational background?

A I'm a graduate of the University of New Mexico. I have a Master's Degree from the Southwestern Baptist Theological Seminary in Fort Worth, Texas.

Q What field is your Bachelor's Degree in?

A Major in English.

Q Your Master's Degree?

A Religious Education.

Q How old are you at this time?

A I'm forty-five.

Q Prior to working for the Bureau of Indian Affairs, had you had any other government experience?

A Military Service. Five, one and a half years of Military Service.

Q At the present time you are under Civil Service, is that correct?

A Yes, I am.

Q Now, in September of 1971, you indicated that you had received a position as a result of an application for a promotion, is that correct?

A Yes.

Q Now, you were only acting in that position at that time, [42] were you not?

A Well, since there was no official notification, yes, it was acting.

Q Acting. And the exhibit that we just talked about, Exhibit Number 17, indicates that on January 27th, 1972, that you were designated as acting, is that correct?

A Yes, sir.

Q And that exhibit indicates, does it not, that the reason for that was because at that time there was a wage-price-type freeze which applied to all government agencies, is that not correct?

A I was never clear as to exactly what the freeze implied or exactly what it was.

Q Do you recall in the latter part of '71, in August of 1971, the President of the United States imposing a wage-price freeze order on all agencies of the government as well as private industry?

A Yea.

Q And it is a fact, is it not, that this continued in one form or another even after the original ninety-day period, is that not correct?

A Yea.

Q And the freeze referred to there is the freeze that the President imposed, as I understand it, is that not correct?

[43] A I am not sure about that.

Q You are not sure?

A No.

Q Do you do the same work now that you did in that acting capacity or is your work different?

A It's similar, but the responsibility is not as great. I am not now supervisor over the three labs, the reading lab, there's a reading lab, language lab and the basic learning lab.

Q Is there anyone who is?

A Yes. Mr. Felts, Director of the IMV.

Q Felts?

A Mr. Jim Felts, yes.

Q And is he your immediate supervisor?

A Yes, he is.

Q Is he an Indian?

A No, he is not.

MR. ORTEGA: That's all I have.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Brown, are you stating in your testimony that this particular job that you sought was abolished because of the Indian Preference Policy?

A I wouldn't be qualified to answer that.

Q You were led to believe that?

[44] A No, I was not. I don't know why it was abolished, I don't have that information.

Q But, as I understood your testimony relating to this Indian Preference Policy, because there were no qualified Indian applications for that position or applicants that met the qualifications for that position, that you were not put into that position, is that your testimony?

A No, that is not.

Q Well, can you relate to me again in what way your application for this particular position relates to the Indian Preference statutes?

A It was simply after acting in the position until the end of June of 1972 of this year, that I was informed, I did not know until that time that sometime previously the position had been abolished, and that with the implementation of the new policy, that this position no longer existed, and I am not sure if it will be reopened. I doubt if it will.

Q But to the best of your knowledge, what was the reason for eliminating this position, because of the Indian Preference Policy? Was there any reason whatsoever for eliminating or abolishing this position because of the Indian Preference Policy?

A I don't think I'm qualified to answer that. I think that would be a question that the Area Personnel Office would [45] have to answer.

Q So, to the best of your knowledge, the termination or elimination of this position does not have any relation to the Indian Preference Policy?

A I'm not sure.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: None, Your Honor, of this witness.

THE COURT: Thank you, you may step down, Mr. Brown.

MR. KULIKOWSKI: I would like to call at this time Mr. Clyde McFalla.

THE COURT: How many more witnesses do you have, counsel?

MR. KULIKOWSKI: Mr. McFalls is the last incident we refer to. We would like to call Mr. McFalls and Mr. Jack Anderson and Mr. Mannie Foster. I would think we could dispose of that in twenty-five minutes.

THE COURT: How many more do you have?

MR. KULIKOWSKI: Those. Mr. McFalls and two others, and then we would like to call one adverse witness that the government has brought out from Washington.

CLYDE McFALLS

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?
[46] **A** Clyde McFalls.

Q By whom are you employed and in what capacity?

A B.I.A., Southwestern Indian Polytechnic Institute, Audio Visuals Production Specialist, GS-7.

Q How old are you, Mr. McFalls?

A Fifty.

Q How long have you been employed by the Federal Government?

A Including two years and eight months Military, about nine years and eight months, something like that.

Q How long have you had work experience in the audio visual area?

A In the audio visual area, this includes all graphics-type work, I assume, doesn't it?

Q Yes, if that's involved.

A Twenty-five years, and thirteen years has been as a first line supervisor.

Q How long have you been employed by the B.I.A. out at the Institute?

A One year, two months.

Q What was your job position prior to that time?

A I was a jump out just prior to the phaseout at Sandia Base in 1968 as a GS-11, and transferred to the Pentagon at the same rate. I stayed there two and a half years at the Pentagon prior to coming to SIPI. I had to resign in order to get back to Albuquerque.

[47] Q What was your title there in Washington?

A Visual Information Specialist Presentation.

Q It was GS-9?

A It was a GS-11.

Q When you returned to Albuquerque and went to work for the Southwestern Indian Polytechnic Institute, what was your GS rating when you started there?

A GS-7.

Q So you went from a GS-11 down to a GS-7?

A I had already resigned my 11 position. This was a reinstatement as a GS-7.

Q Why did you return to Albuquerque, what were the reasons for that?

A My home was here and I just wanted to move back to Albuquerque.

Q Do you qualify for the Indian Preference we are concerned with in this action?

A No, I don't.

Q Mr. McFalls, within the past four or five months did you have opportunity to apply for a position as a Visual Information Specialist, a GS-9, out at SIPI?

A Yes, I did.

Q I hand you something marked Plaintiffs' Exhibit Number 13 and ask you if you recognize that.

A Yes, I do.

[48] Q Is that the POB for which you applied for the position out at SIPI?

A It is.

Q Did you receive that promotion?

A I did not.

Q Did your name appear on a certificate after your application was submitted?

A I was told it wasn't on the first certificate.

Q Did you take any action when learning of this?

A I did talk to our own personnel officers and the EEO officer, Mr. John McConley and, of course, at the time there was very little had come up about the Indian Preference Policy.

Q Was this prior to the announcement of the policy by the way, that you applied?

A Yes, it was prior to the policy, yes.

Q I am sorry, I think I cut you off.

A Well, I did call Mrs. May Hall and inquire why I wasn't put on the certificate, why my name wasn't on the certificate, and she said that as long as one Indian had applied for the position, a non-Indian doesn't have to be considered. I asked her if I have been qualified. She said I was Highly Qualified but due to the Indian Preference Policy, I was not considered.

Q Mr. McFalls, I hand you something marked Plaintiff's [49] Exhibit 16 and ask you if you recognize that?

A Yes, I do.

Q And would you tell the Court in your own words what that particular document is?

A Well, this is the statement in response to my call to May Hall, and it says that "To comply with the Commissioner's new Indian Preference policy, the Indian applicant was the only applicant certified for consideration."

Q So your name did not even appear on the first certification?

A Did not appear on the first certificate, no, sir.

Q And this was because you did not qualify to the Indian Preference?

A Yes.

Q Did you take any action at that time to try and remedy this situation?

A No, other than talking to the EEO officer and our own personnel officer, and this one question that I made for the statement.

Q Do you know whether any subsequent certifications were issued for this particular position, to the best of your knowledge?

A No. Not to the best of my knowledge.

Q Did you receive the promotion that you applied for in the POB?

[50] A No, I didn't.

MR. KULIKOWSKI: Your Honor, we would move the admission of the two exhibits, Plaintiffs' Exhibit 13 and Plaintiffs' Exhibit Number 16.

(Whereupon, Plaintiffs' Exhibits Nos. 13 and 16 were offered in evidence.)

MR. ORTEGA: We have no objection to either one of these exhibits. We would point out that Plaintiffs' Exhibit 16 is already in evidence. I believe that's a duplication of a letter marked Plaintiffs' Exhibit Number 9.

MR. KULIKOWSKI: I am sorry, that's correct, Your Honor. We will withdraw 16 in view of 9 already having been admitted.

THE COURT: Mr. Sherman, do you have any objection?

MR. SHERMAN: No objection.

THE COURT: It will be admitted, Number 13 will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 13 was admitted in evidence.)

Q (By Mr. Kulikowski) Mr. McFalls, what is your present GS rating out at SIPI at this time, is it still a 7?

A GS-7, yes.

MR. KULIKOWSKI: No further questions.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. McFalls, as I understand it, you have approximately [51] nine years of government service?

A Approximate, yes.

Q And some of that was in the military?

A I have almost ten years of service, including two years and eight months military.

Q And prior to your government service, which appears to be the most recent,—

A Yes.

Q —where were you employed?

A With Hays International Corporation. It was a division out of Huntsville, Alabama, it was a technical manual publication division.

Q Were you doing similar work with that company?

A Yes, I was production supervisor over thirteen personnel, which included photographer, typing, illustrating, layout.

Q In your GS-7 position at the Southwestern Indian Polytechnic Institute here, you are under Civil Service, is that not correct?

A Yes.

Q As a practical matter, no one was ever selected for the Visual Information Specialist, GS-9 position that you testified to, is that correct?

A No, sir. Correct.

Q And the reason for that given by the Southwestern Indian Polytechnic Institute was that after evaluation of the [52] staffing pattern and the availability of funds, it was their decision simply not to fill that position, is that correct?

A This is my understanding, yea.

MR. ORTEGA: That's all I have.

MR. SHERMAN: No questions.

MR. KULIKOWSKI: No further questions.

THE COURT: That's all, Mr. McFalls. Thank you.

MR. KULIKOWSKI: At this time we would like to call Mr. Mannie Foster to the stand.

H. MANNIE FOSTER

a witness, having been first duly sworn according to law upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Will you state your name, please, for the Court?

A H. Mannie Foster.

Q By whom are you employed and what is your position?

A Albuquerque Area, Bureau of Indian Affairs.

Q Your position?

A Acting Indian Personnel Officer.

Q What is your area of supervision as far as personnel for the area is concerned?

A Perform the services of the personnel management activities for the Albuquerque area, which includes the [53] State of New Mexico and the Indian Reservations within that which pertains to personnel.

Q Does this also include the Southwestern Indian Polytechnic Institute?

A Yes.

Q Were you present in the courtroom earlier this morning when Mr. McFalls testified in regards to a promotion he applied for at the Institute?

A Yes.

Q Mr. Foster, I hand you something marked Plaintiffs' Exhibit Number 14 and ask you if you recognize that.

A I recognize it as a document. It was issued by the Albuquerque Area Office, signed off by one of the employees of the Southwestern Indian Polytechnic Institute.

Q Does your office out at the area have the responsibility of preparing certifications?

A Right.

Q Is this document I have handed you one of those certificates, so prepared?

A It is such.

Q Does that indicate that this was for the same position that we have discussed earlier this morning arising out of the testimony of Mr. McFalls?

A This indicates it's for the Visual Information Specialist, [54] yes.

Q Do you know whether the named individual on that exhibit qualifies to Indian Preference?

A It is stated on here that he does qualify as an Indian Preference.

Q What is his name?

A It appears to be David Clark.

Q Was a personnel action taken on the basis of this certificate, to the best of your knowledge?

A I don't know. I am not aware of it, anyway.

Q Mr. Foster, I hand you something marked Plaintiffs' Exhibit Number 9 and ask you if you recognize that document.

A This is a letter addressed to Mr. McFalls and signed off on by me, dated July 13th, 1972.

Q Do you recall that communication to Mr. McFalls?

A As of now I don't recall it, but certainly is authentic because I signed off on it.

Q What prompted your letter marked Exhibit 9 to Mr. McFalls?

A I had a request from him, says "Your request for a written statement" as to why he was not on the certificate for this Visual Information Specialist that we referred to over here just a moment ago, and we wrote him this letter indicating to him that "because of the qualified Indian applicant that was certified."

[55] Q And there was no reason for him to have his name appear on the certificate because another certificate with a qualified Indian had been issued?

A Right.

Q Is that other exhibit in front of you marked?

A 14, I believe.

Q That Indian on that certificate?

A It is.

Q I hand you something marked Plaintiffs' Exhibit Number 15, please note it's in two pages, and ask you if you recognize that particular document.

A These are two merit promotion plans certificates issued by our office.

Q Is this for the same position that Mr. McFalls had applied for and for which the other certificate Number 13, 14, I am sorry, is before you? Are those for the same positions?

A Right.

Q Why would it occur, sir, do you remember that a second certificate, namely 16, I believe it is, was reissued?

A No. I am not aware of the details of this particular transaction, although I think perhaps there might be testimony in the file by Mrs. Hall, who testified last week.

Q Just state what you know, if you would, Mr. Foster.

[56] A Well, I don't know.

Q Do you know whether a promotion was ever made in regard to this slot, this vacancy that these two certificates pertain to?

A I think not.

Q Who would decide, Mr. Foster, whether that position was filled or not? Would there be a selecting officer on that?

A Yes.

Q Who would that selecting officer have been in this case?

A The supervisor of this particular job, and I believe, well, I'm not familiar enough with the organization out there.

Q To the best of your memory, would that have been Mr. Jack Anderson?

A Could have been. He certainly could have been in on this selection process, yes.

MR. KULIKOWSKI: Your Honor, we would move the admission of Exhibits 14 and 15, 9 being already in.

MR. ORTEGA: No objection from the government, Your Honor.

MR. SHERMAN: We have no objection.

THE COURT: The exhibits will be admitted.

(Whereupon, Plaintiffs' Exhibits 14 and 15 were offered and admitted in evidence.)

[57] MR. KULIKOWSKI: We have no other questions of Mr. Foster.

(Whereupon, Defendants' Exhibits K and L were marked for identification.)

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Foster, showing you what has been marked for identification prior to this as Plaintiffs' Exhibit 15, which was just shown to you, this consists, does it not, of two certificates, one Indian and one non-Indian, is that correct?

A That's correct.

Q I'll show you what has been marked for identification as Defendants' Exhibit Number L. Was that memorandum originally from your office?

A This is correct.

Q And it refers to Marie Adronicus, who also appears on Plaintiffs' Exhibit 15 as a non-Indian candidate, is that correct?

A Right.

Q Now, Mrs. Adronicus had, it is indicated on there, priority consideration over Mr. McFalls for the selection to this particular job, is that correct?

A Yes, sir.

Q Why was that, according to those documents?

[58] A I'm not familiar with the citation that we have cited, but I think this was because he was already an employee of the Bureau of Indian Affairs.

Q She was a non-Indian employee?

A Right.

Q I will show you Defendants' Exhibit K and I'll ask you if this refers to the same series of transactions, the Visual Informational Specialist out at SIPI?

A Your question is what, again?

Q Does this refer to the Visual Informational Specialist we are talking about?

A Correct.

MR. ORTEGA: At this time we'll offer Defendants' Exhibits K and L.

MR. KULIKOWSKI: No objections by the Plaintiffs.

THE COURT: They will be admitted.

(Whereupon, Defendants' Exhibits K and L were offered and admitted in evidence.)

Q (By Mr. Ortega) Now, referring you to Defendants' Exhibit K, this is the memorandum to your office to one of your employees, May S. Hall, is that correct?

A That's right.

Q And from the Southwestern Indian Polytechnic Institute?

A Right.

Q Indicating that they had decided to not fill the Audio [59] Visual Information Specialist?

A That's right.

Q What reasons do they give in that memorandum?

A "Upon receipt of the Certificate of Eligibles by the Albuquerque Personnel Office, management at the Institute made a decision after evaluation of the staffing pattern in the Instructional Material Center and availability of funds . . .", made them determine that they will not file this position. This is dated November 1, 1972.

MR. ORTEGA: We have no further questions of this witness.

MR. SHERMAN: No questions.

MR. KULIKOWSKI: No questions.

THE COURT: You may step down, Mr. Foster.
We will take a short recess.

(Whereupon, the Court stood in recess at 10:33 A.M.)

(Whereupon, Court was resumed at 11:43 A.M.)

MR. KULIKOWSKI: We would like to call Mr. Jack Anderson to the stand.

JACK R. ANDERSON

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

[60] A Jack R. Anderson.

Q By whom are you employed?

A By the Bureau of Indian Affairs at the Southwestern Indian Polytechnic Institute.

Q What is your job at the Institute?

A I am the Assistant Superintendent in charge of the Instructional Division.

Q Does a Mr. Ray Brown come under your supervision?

A Not—I am not his first line supervisor, no.

Q Would it be second line, fair to say that you are the second line supervisor?

A Yes.

Q Were you present when Mr. Brown testified earlier this morning as to the promotion or temporary promotion he received out at the Institute?

A Yes, sir.

Q Do you recall that the position that Mr. Brown had applied for was abolished in June of 1972?

A Yes.

Q Do you recall informing Mr. Brown of that job being abolished?

A Yes.

Q Do you recall if that was before or after the Indian Preference went into effect?

A I don't recall exactly.

[61] Q Do you recall the reason you stated for the job being abolished?

A The reason that I gave Mr. Brown is the fact that the President's Directive at that time put a freeze on additional, in regards to our situation, additional new job promotions into another area.

Q At that time did you tell Mr. Brown that if the job was reopened, that it would come under Indian Preference?

A I don't recall that, no.

Q Mr. Anderson, I hand you something marked Plaintiffs' Exhibit 17 and ask you if you recognize that.

A And your question, sir?

Q Do you recognize that?

A Yes, it was signed off by me.

Q Is it correct to say that that was the notification to Mr. Brown that he had been assigned to that acting position out at SIPI?

A Acting Education Specialist, yes.

Q Do you recall when Mr. Brown was selected for that position?

A To the best of my knowledge, it was in the summer.

Q Of the year before?

A No, not in '71. Let's clarify the position.

Q The acting position of an Educational Specialist, IMC, a GS-11.

A That was in '72.

[62] Q You do not recall him filling that capacity initially in September of 1971?

A In 1971 Mr. Brown was hired as an Education Specialist, and that is the job that they're referring to here.

Q That would be the Education Specialist, IMC, a GS-11 slot?

A I don't believe so.

Q Do you recall Mr. Brown going before the School Board out at SIPI in relation to this vacancy that's involved here?

A We had presented and recommended Mr. Brown for this position before the School Board, yes.

Q Do you know if the School Board acted on that recommendation?

A At that time they agreed with our recommendation.

Q Which was what?

A That Mr. Brown be the person selected.

Q For this GS-11 position?

A Right.

Q Do you recall when that was when the Board met and the recommendation was accepted?

A No, sir. I don't recall the exact date.

Q Could it have been September of 1971, to the best of your recollection?

A I don't believe so.

[63] Q When you notified Mr. Brown that the job had been abolished, I believe it's your testimony you don't recall when that was, is that correct?

A I can't give you the exact date, no, sir.

Q Do you remember the month?

A No, sir, I don't have my records in front of me. I would hesitate to guess.

Q Is it possible that it was after the Indian Preference went into effect?

MR. ORTEGA: I'm going to object, Your Honor, he's trying very hard.

THE COURT: Yes, sustained, counsel. He has said that he doesn't remember.

Q (By Mr. Kulikowski) Mr. Anderson, were you present this morning when Mr. Clyde McFalls testified in this cause?

A Yes.

MR. ORTEGA: We are going to object at this time about the testimony of Mr. McFalls. It was gone into on the Preliminary Injunction Hearing. Anything on that that you would go into would be repetitive.

THE COURT: We can't tell what the question is going to be. A great deal of this is cumulative.

MR. KULIKOWSKI: Mr. McFalls was not present at the Preliminary Injunction Hearing. That is part of the [64] reason we called Mr. Anderson at this time.

THE COURT: Go ahead, ask your question.

Q (By Mr. Kulikowski) Mr. Anderson, do you recall Mr. McFalls applying for the job that he testified to earlier this morning?

A Yes.

Q Would you have been the selecting officer to fill that vacancy?

A I would have been one of either two or three.

Q Who would the other individuals that were involved in the selection, who would they be?

A The Superintendent, and the Assistant Superintendent for Administration.

MR. ORTEGA: We are going to object now. This is going into exactly what we went into at the Preliminary Injunction.

THE COURT: Yes, that's correct. And you have also gone into it this morning.

MR. KULIKOWSKI: There was one matter that was not discussed at the Preliminary Hearing. It bears on the important aspect of the Indian Preference. The exceptions been made—

THE COURT: Why don't you get to that particular point? It has already been established that this position was not filled by anybody.

[65] **MR. KULIKOWSKI:** We feel that the reasons why it was not filled goes off—

THE COURT: Get directly to the point, if you would, counselor.

MR. KULIKOWSKI: I'll try my best to do that, Your Honor.

Q (By Mr. Kulikowski) Mr. Anderson, is it not a fact that having a voice as a selecting officer, that it was your opinion in that capacity that you abolished or had this job abolished rather than give it to someone who you felt was not qualified or give it to Mr. McFalls because that would have required special permission being obtained from Washington?

MR. ORTEGA: That's leading.

THE COURT: That's not a pertinent question, counselor. Objection sustained.

Q (By Mr. Kulikowski) Mr. Anderson, in your opinion as a selecting officer, was Mr. McFalls qualified for the job that he applied for?

A In my opinion he would have been.

Q Would you categorize his qualifications as extremely highly qualified?

MR. ORTEGA: We went into this the last time and this we find objectionable. We object.

THE COURT: Yes, counsel. Mr. McFalls was not [66] certified anyway, so this witness had no opportunity to consider his qualification. Objection sustained.

MR. KULIKOWSKI: Plaintiffs' Exhibit 15 shows that he was certified.

THE COURT: I am sorry about that.

Q (By Mr. Kulikowski) I'll show you Plaintiffs' Exhibit 15, Mr. Anderson, and ask you to recognize that.

THE COURT: The subject has been covered already by your counselor. You can ask your question about this exhibit if you like.

Q (By Mr. Kulikowski) Do you recognize that certificate?

A Yes.

Q Does Mr. McFalls' name appear on that certificate?

A No.

Q Would you refer to page two of the certificate?

A Yes, it appears on page two.

Q Did you consider these certificates?

A Yes.

Q Is your role as a selecting officer?

A I am one of a team that considered them, yes.

MR. KULIKOWSKI: We have no further questions, Your Honor.

MR. ORTEGA: We have no questions of this witness, Your Honor.

MR. SHERMAN: No questions.

[67] **THE COURT:** You may be excused, Mr. Anderson.

MR. ORTEGA: May Mr. Anderson be permanently excused?

THE COURT: Yes.

MR. KULIKOWSKI: Your Honor, at this time we would like to call Mr. Gunter and we would like to ask that he be declared, for purposes of our examination, an adverse witness. Mr. Gunter is the Chief Personnel Officer out of the B.I.A. in Washington.

RAYMOND GUNTER

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

A Raymond Walter Gunter.

Q What is your position?

A I am the Personnel Officer for the Bureau of Indian Affairs located in Washington, D. C.

Q Who is your direct supervisor?

A Carl Cornelius, Director of the Administrative Services.

Q Who would be his immediate supervisor, would he report directly to the Commissioner?

A His immediate supervisor is the Deputy Supervisor, John Crow.

[68] Q Is it fair to say that you are the head personnel executive for the Bureau of Indian Affairs?

A That is correct.

Q How long have you served in that capacity?

A Since July of 1967. Approximately five and a half years.

Q You are then, I take it, familiar with the Indian Preference Policy which is the subject of this present cause, is that correct?

A Yes.

Q In your opinion, and based on your job and your experience in that job, is the policy, as stated and announced on June 23rd, being fully implemented at this time?

A That's a little hard to answer because the implementing procedures, that is, the revisions to the promotion program in final form have not been issued to the field. Now, the reason for this is that any revisions to

a promotion program require the approval of the Office of the Secretary. Those revisions were sent to the Office of the Secretary several months ago; approximately three weeks ago we got back the approval to go ahead with the revisions.

However, because of incidents in Washington, we have not yet been able to prepare that release and get it to the field, so in the meantime, the field is operating [69] with interim procedures.

Q It was your understanding that the policy, when announced, would be put into immediate effect, is that correct?

A It would be put into immediate effect, yes.

Q To the best of your knowledge, that has been done with the qualification that there are interim regulations in effect?

A To the best of my knowledge, yes.

Q Mr. Gunter, did you participate in the formulation and the establishment of this policy before it was announced?

A Yes, I did.

Q What was your role, or what function did you perform in the implementation and the formulation of the policy?

A Well, it was the responsibility of my office to do the staff work in the Bureau to provide the various alternatives, and the information was pertinent to deciding whether the Indian Preference Policy should be changed.

Q Changed from what to what?

A Changed to what it had been up until that point, and that is the application of the preference at the initial appointment.

Q And what were some of those factors, based on your having gone through that experience?

A I'm sorry, I don't understand the question.

[70] Q I believe you testified just a minute ago that you considered these alternatives, and I believe you used the word "factors" that went into whether the policy

would be changed, and I wonder if you would relate for the Court what those alternatives were.

A What I intended to say was that we had prepared several different ways in which the Preference Policy could be applied, all the way from what was currently into effect to complete preference in all respects, and several intervening stages.

Now, the purpose of this was to provide the Commissioner, and ultimately the Secretary, the various pertinent bits of information in making such a decision.

Q Do you know why the policy came up for review? Were you ever informed as to—

A Yes. If I might go back a bit. The policy has been reviewed three times, commencing in 1966. The first time was, this was before my being placed in the position in Washington, it was in the spring, I believe, of 1966. The Bureau made a thorough review of the policy at that time and issued the policy that was in effect up until July 23rd of this year. That policy being that Indian people, qualified Indian people would have preference on initial appointment and provide the implementing procedures for doing this.

[71] Prior to that time it had been a policy but had not been consistently applied throughout the Bureau.

Then in 1970, approximately March of 1970, when the new Commissioner, Bruce, was on the job, we made another review and I participated in that particular review. At that time the Commissioner and the Secretary's Office, the Assistant Secretary's Office decided to continue the policy as it was currently in effect but to add to it some other features.

Let me explain this for just a minute. We presented three alternatives to them, one was to continue the policy as it had been; two was to extend the Preference into promotions and training; and the third alternative was to continue the existing policy but to accelerate and make a much more comprehensive effort in recruitment to develop new training programs that would assist people in developing skills much more rapidly for advancement.

The third alternative at that time was taken and was put into effect.

Q And the present policy is this third alternative?

A No, it is not. Let me explain what the alternative was that was placed into effect. It did not really change the Preference Policy as such but it did add a much more comprehensive training effort, development effort, with particular emphasis to development needs of Indian people, [72] and it did include a much more comprehensive recruitment effort, particularly at seating Indian people who could qualify for what we called the entrance time positions for administrative technical or administrative positions. It is from these levels that these people are moved up to higher-grade management position. That alternative was put into effect at that time.

Then approximately March or April of 1971, the policy was reviewed again, or at least the review commenced in September. The Bureau developed a proposal and submitted it to the Department following several months of consultation with the Civil Service Commission within the Department with the Indian Health Service, HEW, which has a similar policy deriving from the 1934 Act.

The Secretary did decide to put that policy into effect, and that's the policy that was announced by wire to the field on June 23rd, I believe, of this year.

Q Were you in on the first review back in 1966?

A No, I was not.

Q In the second review in 1970, was it considered that the policy would be expanded to include promotion and training?

A This was one of the alternatives considered but it was decided at that time not to do that.

[73] Q Do you know what the reasons were for that decision?

A No. I can only speculate, I did not make the decision, but it's a combination of things. It's my understanding, I would like to state this as far as the Preference Policy itself, and you can see this by reading the Hearing, particularly the 1934 Act, that the intent of the Preference Policy is that the Indian Service be staffed

with an Indian staff in total. This seems to be the intent of the statute. I'm referring to the 1934 Act.

Our concern has been to increase the involvement of Indian people at all levels in the Bureau but we have attempted to try to do it, recognizing that we have a large staff consisting of people from many ethnic backgrounds. Up until this year we had attempted to, other methods to accelerate the advancement of Indian people. We were not satisfied that the progress was being made that both the Commissioner and Secretary felt was necessary in order to greatly increase the number of Indian people in all levels.

Q You say that you considered or you referred to the 1934 Act, what Act would that be?

A It would be the Wheeler-Howard Act, June of 1934. It's the Indian Reorganization Act.

Q It goes by both of those names, the Indian Reorganization [74] and the Wheeler-Howard Act, is that correct?

A That's my understanding.

Q And is it correct that what is now Section 472 of Title 25, U.S. Code 1 of the Section out of that Act that was relied on in formulating the policy?

A This is the section that contains the Indian Preference statement, that's correct.

Q Were there other sections out of the Code that were relied on in formulating the policy?

A Out of the Code, yes. There are several earlier Indian Preference statutes going all the way back to 1934, I believe. There are three or four sections, I am not sure of the exact number, 40, 45 in the Code, which are the earlier statutes that refer to Indian Preference.

Q Now, the new Indian Preference refers to those being qualified for the Preference being one-quarter Indian blood or more, is that correct?

A That's correct, one-quarter degree of Indian blood of a federally-recognized tribe.

Q What was the reason that that particular fraction was used in formulating the policy?

A Well, it stems from a 1938 executive order. This is the authority that the Bureau has used for the quarter degree.

Q Is there, to your knowledge, and based on your formulation or hand and formulation, is there anything in the Indian [75] Reorganization Act dealing with the degree of blood necessary for Indian Preference?

A Yes, there are provisions in the Indian Reorganization Act. I'm not at this point, I couldn't tell you, I am not that familiar with those provisions.

Q In formulating the policy, was it ever raised that the fraction contained in the Indian Reorganization Act would be one-half or more Indian blood?

A No, this point never came up.

Q It wasn't discussed or didn't play a role in the formulation?

MR. ORTEGA: That's misleading. We're going to object to that because I think the Indian Reorganization refers to certain qualified type of Indian only one-half of which would be one-half Indian blood.

THE COURT: I think he can clarify the question. I think the witness understands the question. I don't quite understand why this is pertinent anyway. We are confronted with the Act as it is now and that's our problem today. The background is interesting but make it as brief as you can.

MR. KULIKOWSKI: We're trying to bring it out before the formulation of the new policy so there's no doubt as to what was used.

Q (By Mr. Kulikowski) Mr. Gunter, are you aware of a policy or proposed policy within the Bureau dealing with out [76] placement of non-Indians within the B.I.A.?

A Yes, I am.

Q Is that a proposed policy or an announced one?

A It's a proposed policy. Early in the discussions as to whether the Preference should be extended into promotions and training, this type of thing was discussed and we've had many discussions, particularly with the national office, the National Federation of Federal Employees, which office made strong recommendations, both to

us and to the Department, that such a policy be developed.

We have had similar comments from their Locals of that particular unit and individuals. We also felt that we should develop such a policy and there is such a policy now in draft form that's being discussed in the Office of the Secretary.

Q What would the policy provide for in the way of out placement?

A Well, this is what we are trying now to formulate, but briefly and generally speaking, it would provide assistance to employees who wish to seek employment in other Bureaus of Interior or other federal agencies.

Q Is it felt that there will be a demand to such service within the Bureau?

A Yes. We have had requests from individuals. We have no idea how many, but have had individual requests from [77] people already.

Q Is this proposal being considered because of the Indian Preference Policy?

A Yes, it is.

Q In other words, is it anticipated at the Bureau that there will be quite a number of non-Indian employees who will be intending to leave the B.I.A.?

A No. I would not say that the policy is being developed for that purpose. We have developed it because we have had requests from employees for assistance and what we are trying to do is to respond to these requests.

Q Do you have any idea what the number of requests would be? Could you characterize for us even in a ball park figure?

A No, I couldn't at this point. But I don't believe there are a large number at this point. I can only speak from my own personal experience, and this involves, oh, probably ten or fifteen people.

Q That you have looked at—

A That have requested assistance. Let me add that this is not unusual. The Bureau of Indian Affairs, for two or three years now, has been in a state where employees have been considerably agitated for a number

of reasons. Part of the desire to leave the Bureau stems from other reasons than what you are alluding to. Also in the [78] normal course of events people ask for assistance and the Bureau has always had a policy of assisting employees in any way that it could who wanted to seek employment elsewhere. It can occur for a variety of reasons.

Q Is it a fair statement to say, though, that the Indian Preference Policy has spurred the intention to develop such a policy?

A Yes.

Q Mr. Gunter, getting back to the Indian Reorganization Act of 1934, also referred to as the Wheeler-Howard Act, are you familiar with a provision in that Act that gives the various Reservations individually the right to reject the provisions of that Indian Reorganization Act?

A Yes, I am familiar with the provision.

Q Do you know, based on your experience with BIA, that Reservations have so rejected the Act?

A I understand that a few have. I am not familiar with which tribes these are except for the largest, the Navajo Tribe.

Q So, it is your understanding, based on your official duties, that the Navajo has rejected the Indian Reorganization Act?

A That's my understanding.

Q Are there other Reservations in the United States that have [79] done so, to the best of your knowledge?

A I can't answer that question. I don't really know.

Q Mr. Gunter, is it fair to say that part of your official duties is monitoring the implementation of the Indian Preference Policy?

A Yes.

Q In performing that duty, do you monitor the personnel actions that are made under the policy?

A Well, that's difficult to answer. We have a pretty complete delegation of authority to our area offices and to our one administrative activity that serves central office positions in the field. We have only approximately nine hundred positions that are served out of the Wash-

ington office, the Washington operating office, which is under my direct supervision.

The remainder of the Bureau, in the neighborhood of some fifteen hundred thousand positions, the appointing authority, except for key positions, remains in the Washington office in this one administrative unit.

Our monitoring persists of periodic evaluations which probably would not occur more often than once every two or three years.

Q In performance of your duties and in monitoring the personnel actions that are taken, are records kept as to which vacancies are filled by Indians and non-Indians [80] at the Washington office?

A Not for all positions, no. Just those that are served out of Washington. These records that you refer to are maintained in the area personnel offices and in the one administrative office to the central office activities in the field.

Q Where would that be?

A Here in Albuquerque.

Q But this information is readily available to someone in your position in Washington, is that not correct?

A That is correct. Yes.

Q I hand you something marked Plaintiffs' Exhibit Number 10 and ask you whether you are familiar with the content of this document.

A Yes, I am. This was prepared by my staff.

Q What, in your own words, does the document reveal relative to the new Indian Preference Policy?

A Well, it's hard really to tell. Well, what is on the document is a total of promotions that took place prior to June 23rd, which is the date that the new policy went into effect, and since June 24th. The number of promotions is broken down by Indian and non-Indian.

Now, there are a couple of difficulties with the information that is here. Number one, the number of promotions which are much less from January 1 to June 23rd; [81] one of the reasons for this is that we were under rather stringent employment fund controls at that time.

Q Since the policy has gone into effect, has there been

a noted increase percentagewise of Indians that have received promotions according to the plan?

A This is correct, but you cannot tell from the figures that are contained there which of those were affected by the policy and which are people that were selected or would have been selected regardless of the policy.

Q What is the time period covered in these statistics that your office prepared?

A Well, the first period was from January 1 to June 23rd, just prior to the effective date of the new policy. The later period is from June 24th to November 15th, which is a period of time during which the policy has been in effect.

Q What do the figures show as far as the promotions made to Indians and non-Indians for the former time period, namely from January 1st to June 23rd of this year?

A Well, they show an increased percentage of Indians being promoted in relation to non-Indians, is that what you are asking?

Q Yes. And the same question for the later period, namely from June 23rd to the cutoff date.

A Well, in both periods there were more Indians promoted [82] than non-Indians. However, in the later period, that is the period since the policy has been in effect, the percentage of Indians promoted has increased over what it was in the previous period.

Q Could you state what degree of percentage or percentage increase there has been since the policy?

MR. ORTEGA: Your Honor, the figures speak for themselves.

MR. KULIKOWSKI: All right. We will move the admission of this document at this time.

(Whereupon, Plaintiffs' Exhibit No. 10 was offered in evidence.)

THE COURT: Any objection?

MR. ORTEGA: The government does not. But I would like the Court to know that the document was supplied by the government in response to a Request for

Documents submitted by Plaintiffs' counsel. Those documents could not be supplied and it wasn't any desire on our part not to comply, it was simply that the documents did not exist to furnish this kind of information. We therefore gathered the information requested and supplied it in the form of this letter and that's what this exhibit is, Your Honor.

MR. SHERMAN: We do object to the introduction of this exhibit. I don't know if the Court has had a chance to see it, but that particular exhibit, it seems to us, is [83] irrelevant. It really doesn't indicate to us whether any of those Indian employees after June 23rd have had the benefit of the Indian Preference statute.

THE COURT: Well, counsel, you can examine the witness with regard to that. The exhibit will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 10 was admitted in evidence.)

THE COURT: Are you through, Mr. Kulikowski?

MR. KULIKOWSKI: Yes, I am.

THE COURT: Go ahead, Mr. Sherman.

MR. SHERMAN: Would you prefer that I voir dire him now on the exhibit?

THE COURT: Yes, go right ahead.

VOIR DIRE EXAMINATION

BY MR. SHERMAN:

Q Referring to Exhibit 10, do you know precisely the Indians that have been promoted as a result of Indian Preference statutes since June 24th, 1972?

A No, I do not.

Q Is there any way whatsoever to tell what that number would be from looking at Plaintiffs' Exhibit 10?

A You cannot tell it from the exhibit.

Q So the exhibit in no way would indicate how the Indian Preference Policy has affected the increase of Indian promotions in the latter part of this year?

[84] A In my opinion, no.

MR. SHERMAN: No further questions.

THE COURT: Do you have something, Mr. Ortega?

MR. ORTEGA: Yes, Your Honor, we do have something.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Gunter, first of all, everyone else has been asked this question, are you entitled to the Indian Preference?

A No, I am not.

Q How long have you been in personnel work, Mr. Gunther?

A Approximately fifteen years.

Q Has this been with the United States Government?

A It's been with the United States Government, that's correct.

Q In this connection, in connection with your personnel work and in your employment with the Bureau of Indian Affairs, are you familiar with the approximate number of Indians employed in the Bureau of Indian Affairs in 1934?

A Well, the information that I have comes from documents, some of which I believe are in this case in evidence. The information I have indicates that approximately 2,100 Indians were employed in 1934 out of total employment population of about six thousand five, or roughly about thirty-four per cent.

Q At the present time in 1972 what are the percentages?

[85] A Well, the percentage as of May of this year was fifty-seven per cent of the total employment of the Bureau was Indian.

Q And the total employment is, I think you indicated in your earlier testimony, somewhere in excess of 16,000?

A Yes.

Q Approximately what is that figure at this time, the total employment?

A It is—I thought I had the figure here. But it's approximately 16,500.

Q Of that fifty-seven per cent, approximately, at this time are Indian?

A Yes. Now, I probably should add that that includes all employment, all what we call full-time employment which calls temporaries as well as permanents.

Q Are you familiar with the numbers, percentages of Indians in the various GS classifications in the Bureau at this time?

A Yes, I have made some computation on this.

Q Are these from records in the Bureau of Indian Affairs?

A Yes, sir.

Q At the present time can you tell us what the figures are with reference to GS-7 and below?

A Yes, there's a—now this is as of May of this year, there are a total of 7,527 employees GS-7 and below, of which 5,749 are Indian, which consists of seventy-six [86] per cent.

Q And in the area of GS-9 through GS-12, approximately what are the numbers of total employees and what percentage of those are Indians?

A Well, there's, for GS-9 through GS-12, a total of 5,195 employees, of which 1,180 are Indians or a total of twenty-one per cent. Roughly one in five.

Q In your experience with personnel work, from what group of GS level does the positions GS-12 and above, I talk about those as management-type positions, from what group do they come from?

A They generally come from the, what we call the middle management group. The GS-9, GS-12, predominantly.

Q In GS-12 and above, what are the percentages of Indian employees as opposed to non-Indian at this time?

A Again, as of the same date, May of this year, there were 1,684 total employees of GS-12 and above, of which twenty-one per cent were Indian.

Q So the approximate percentage of twenty-one per cent from GS-9 to 12 and GS-12, is the same, is that correct?

A Approximately, yes.

Q Now, in your discussions concerning the implementation, or, rather, the formulation of the new Indian Preference Policy, were you trying to carry out the intent of Congress in this?

[87] A This was our purpose, yes.

Q Can you state from your position as a personnel administrator what you would expect from this policy with respect to promotions in the area of GS-12 and above?

A I would expect that the rate of Indian people advancing into those grades would increase considerably. As far as reaching, let's say, total Indian employment, this, I am sure, will take many years. It will be, I think, a gradual process.

Q Are there certain jobs within the Bureau of Indian Affairs for which there are very few Indians qualified?

A Yes. Several of the professional occupations have very few Indians, as an example, our engineering work for us, we have very, very few Indians and, well, there are other occupations, as an example, during this period that the policy has been in effect there have been quite a number of non-Indians selected at the higher grade levels simply because there were no qualified Indian people available.

Q So promotions have been going on to non-Indians in these grade levels notwithstanding the policy?

A Yes.

Q You mentioned in your earlier testimony that the Indians' Health Service had a similar policy. The Indian Health Service is not within the Bureau of Indian Affairs, is [88] that correct?

A No, it is not. It used to be. It was transferred to what is now the Department of HEW in 1956, but upon transfer, the same policies under these Indian Preference Policies were carried over into other operations and they

are not operating from the same legislative base that we are.

Q Did they commence an Indian Preference Policy with respect to promotions at an earlier time than the Bureau of Indian Affairs?

A Yes, they did. During the period that the discussions were going on we had had several discussions with them. They had, prior to that date, extended the Preference Policy into promotions. Now, in a different way than the Bureau has, but they had actually extended the Preference into promotions.

Q What is the difference, if you can explain it?

A Well, their policy statement says something to this effect, that other things being equal, the Indian will be given preference unless there are pertinent management reasons for not giving that preference to that individual. Whereas our policy reads that if an Indian is qualified, he will receive preference, he or she will receive preference for the vacancy.

Q Under the policy as it is now being implemented, under what I understand to be sort of an interim procedures,—

[89] A Yes.

Q —the matter of non-Indians getting promotions is referred to as an exception of some sort, is that not correct?

A This is correct if for the same vacancy there is a qualified Indian.

Q Now, have applications been made for exceptions in this regard?

A Yes.

Q Are some still pending with the Bureau?

A Yes. We have several pending at this point.

Q And those decisions will be made by the Commissioner, is that correct?

A Yes. They're made by the Commissioner based upon a recommendation from his executive staff.

Q That would be Mr. Crow's office, the deputy?

A Yes. And the various directors.

Q Do you have anything to do with that recommendation, your office?

A Yes. Again, we do the staff work for that Executive Committee and for the Commissioner. We review the justification material and make a recommendation to the Director and to the Commissioner as to whether we think the exception should be granted or not.

Q Throughout your discussions leading up to the new policy, [90] was it expected that exceptions would be applied for and made from time to time?

A Yes. This was the reason the exception policy was written or exception statement was written into the policy. We do not anticipate a large number of exceptions however.

Q Now, with reference to this Excepted Service and Civil Service, would you explain to me what the Excepted Service means?

A Yes, it stems from an authority that we have from the United States Civil Service Commission that stems from the 1934 Act. And that is that we are permitted to hire into positions qualified Indians, they must be qualified for the position, those Indians who are a quarter degree of Indian blood of a federally-recognized tribe. These Indians can be hired without regard to the examining processes that are in the federal service, or what is called the competitive service.

Q Competitive is what the Civil Service Administration administers?

A Yes.

Q Approximately what part of the percentage of the employees of the Bureau, if you can give us, are in the Excepted Service, that is of the Indian employees?

A I am not absolutely sure. I would judge about fifty [91] per cent of the Indian people are in the Competitive Service, and roughly fifty per cent are in the Excepted Service. I think, if I'm in error in that, it would be to the extent that there are more in the Excepted than the Competitive.

Q Now, the Excepted Service applies only to Indians?

A That is correct.

Q And all non-Indians within the Bureau of Indian Affairs would come within the Competitive Service?

A That's correct.

Q Now, as Chief Personnel Officer of the Bureau of Indian Affairs, have you noted any serious impact on the programs of the Bureau as a result of the new policy?

A No, I have not.

Q Now, with reference to this middle management group, GS-9 through GS-12, is that the area from which management, promotion into the management of B.I.A. come from?

A Yes, that's correct.

Q Have you observed any tendency for Indians, the Indian people to have difficulty in obtaining promotion in the situation of where they are one to five in that particular grade level, promotions up to the higher grade levels?

A Well, yes. I think the statistics alone would indicate that if there is any relevancy between the percentage of [92] Indians at those grade levels, in other words, one and five, the statistics alone are a factor. One of the problems of the Bureau, the size of the Indian Bureau has is actually to keep in mind and keep well aware of the career development of all of its employees. It's very hard to do because they're spread all over the country and very remote locations and very often many people can get overlooked in this process.

This is one of the reasons why we have designed some new programs to attempt to avoid this. But those instances, if the statistics of one to five mean anything, it probably would have an effect in that kind of setting.

Q I believe you mentioned the one-quarter blood requirement comes from a 1938 executive order?

A That's my understanding, yes.

Q And one last question, the time frame requested in Plaintiffs' Exhibit Number 10 here, January 1st through June 23rd and June 24th through November 15th was specified by the Plaintiffs in the case, was it not, in that exhibit?

A Yes.

MR. ORTEGA: I think that's all we have of this witness.

MR. SHERMAN: Your Honor, may I?

[93] **THE COURT:** Mr. Sherman.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Gunter, do the Bureau programs deal with other groups or sectors of our society other than American Indians?

A No.

Q Is this unique in the terms of a federal agency dealing exclusively with one particular minority or racial group?

A In my knowledge, it is. I only know of one other bureau that's in Interior, that deals with the Trust Territories where an agency's complete program is with one ethnic group.

Q So, other than the Indian Health Service, the Bureau has a unique status in the American government?

A Yes.

Q Does the work deal primarily with the reservation Indians?

A Yes.

Q Almost exclusively with the reservation Indians?

A It's predominantly reservation Indians.

Q Is reservation land owned by Indians?

A Yes. It's owned both by the tribe and in many instances individually by Indians, but it is owned by Indians, yes.

Q Would you characterize the effect of the Bureau programs on Indian life on or about the reservations?

MR. KULIKOWSKI: We are going to object to that [94] question. I don't think there has been any foundation laid or any competency shown on Mr. Gunter's part to testify as to something of that nature. Personnel, yes, but not life on the reservation.

THE COURT: I don't think he has qualified in that respect, counsel.

MR. SHERMAN: May I attempt to qualify him?

THE COURT: You are cross-examining the witness, this is the Plaintiffs' witness. He's an adverse witness. Do you have anything further on cross-examination?

MR. SHERMAN: Yes, I do, Your Honor.

Q (By Mr. Sherman) On these Indian Preference statutes that we're referring to, Mr. Gunter, do they have any application outside of the Bureau of Indian Affairs or Indian Health Service?

A No, they do not.

Q So, in other words, an Indian employee of HUD or NASA or other federal agency would not have the benefits of any preference?

MR. KULIKOWSKI: We are going to object to that question. I don't think Mr. Gunter is competent to testify what is going on in other agencies when employed with the B.I.A.

THE COURT: I think he's qualified as a personnel expert. I am sure he knows what is going on in personnel in other departments and agencies. You may answer the question.

[95] **A** No, the Indian Preference authorities pertain only in the Bureau of Indian Affairs within Interior and with Indian Health Service. It does apply in a very limited way with some of the other bureaus but it's very limited.

Q Mr. Gunter, showing you Defendants' Exhibit B, can you identify what this document is? Mr. Gunter, isn't that a 1946 memorandum legal opinion from the solicitor of the Department of Interior?

A Would you give me just a minute?

MR. KULIKOWSKI: We are going to object to the form of the question.

THE COURT: Just a minute, counsel. He hasn't had an opportunity to consider an answer yet.

A I am ready to answer.

Q (By Mr. Sherman) Would you identify that document, please?

A Yes. This is a 1946 or 1947 opinion of the Department of Interior of solicitor.

Q The opinion has been rendered to the Commissioner of Indian Affairs?

A No, it's to the Director of the Personnel in the Office of the Secretary.

Q Does that opinion deal with the subject of Indian Preference within the Bureau of Indian Affairs?

A Yes, it does.

[96] MR. KULIKOWSKI: We are going to object to the line of questioning. There's no competence on the part of Mr. Gunter to testify what's in a legal opinion by someone not in his office.

THE COURT: Well, he has testified as to what the document is. I am sure counsel won't ask him to express a legal opinion on the subject. The objection is overruled.

Q (By Mr. Sherman) In your review of the Indian Preference Policy within the Bureau of Indian Affairs, have you considered that document before?

A Your question is a little difficult to answer. In our review of the material on the subject of Indian Preference which was made commencing in the spring of last year leading to the present policy, we, in searching the records that we could find, we could find no reference of any document or anything which would indicate that this particular opinion had been considered at a time prior to last spring.

Now, what I'm saying is that we were not able to find any documents. I'm not saying that it was not considered. I do not know.

Q But in your review of the Indian Preference statute, have you and other employees of the Bureau had the benefit of reading that document prior to making your June 23rd policy?

A That's correct.

[97] Q And you are aware that that opinion from the solicitor recommended that preferences be granted in promotions as well as initial appointment?

A Yes.

Q To the best of your knowledge, was that recommendation of the solicitor ever followed by the Bureau of Indian Affairs during the '40's and 1950's?

A To my knowledge, no.

Q Now, Mr. Gunter, as the Chief Personnel Officer of the Bureau of Indian Affairs, is it your opinion that if Indian employees had received promotions, preferences in the area of promotion during the 1940's, '50's and '60's, this would have increased the number of Indian employees in the higher level positions?

MR. KULIKOWSKI: We're going to object to that question that there has been no showing that Mr. Gunter was employed at that time and therefore he's not competent to testify to that matter.

MR. SHERMAN: He has had complete access to the files of the Bureau.

THE COURT: I think he can express an opinion on the subject and within the limitations of his experience and the Court will consider the factor involved in it. Answer the question.

A Yes, it's my opinion that had this policy been put into [98] effect at an earlier date that the number of employees in the various grade levels at all levels would have been much greater than it is today.

Q The number of Indian employees?

A The number of Indian employees, yes.

Q Therefore it's very possible that these promotions would have resulted in Indians rising to higher—

THE COURT: Counsel, you are getting beyond the subject of this litigation. We are not trying the issue as to when it should have been put into effect. It was put into effect June 23rd and that's what we have to consider.

Q (By Mr. Sherman) Mr. Gunter, of the non-Indian workers presently with the Bureau of Indian Affairs, what percentage of this non-Indian work force is made up of other minority groups other than Indians?

A Well, the percentage is very small. Again, on the basis of the May statistics of this year of 1.7 per cent of the total employment was Black, 1.7 per cent was Spanish-American, and then other minority groups were greatly limited beyond that.

Q In other words, other minority groups would be much smaller?

A Much smaller than that percentage.

MR. KULIKOWSKI: We object to this line of questioning. I think the only thing before the Court is whether the [99] individuals receiving or not receiving Indian are Indian or not Indian or whether they are green or purple or Italian doesn't make any difference.

THE COURT: He has answered the question. If you will limit the scope of your questioning on Cross-Examination.

Q (By Mr. Sherman) Mr. Gunter, referring to the question by Plaintiffs' Counsel as to the Navajo Tribe's rejection of the Indian Reorganization Act, do you know whether the Navajos today accept or reject the benefits of Indian Preference?

MR. KULIKOWSKI: Your Honor, we're going to object to that question. I don't think Mr. Gunter is competent to answer.

THE COURT: The objection is overruled. He knows.

A The Preference Policy does apply on the Navajo Reservation, that is correct.

Q (By Mr. Sherman) Is there any Indian tribe or reservation in the United States that does not accept the benefits of Indian Preference?

A All federally-recognized tribes are entitled. The members of that tribe, if they are a quarter degree or more, are eligible for those benefits. Now, there are some tribes where the federal relationship has been terminated and it does not apply in those instances.

Q But you know of no instances where the benefits of Indian [100] Preference have been rejected by an Indian tribe or reservation?

A No, I do not.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: May it please the Court, we have just a few. We feel new areas were opened up by the questioning of Mr. Sherman and Mr. Ortega.

THE COURT: Yes, go ahead.

REDIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Mr. Gunter, you testified from an opinion of the solicitor's office of the Department of Interior?

A Yes.

Q Is this Defendants' Exhibit B?

A Yes.

Q And when was that opinion issued?

THE COURT: Counsel, that has been covered.

MR. KULIKOWSKI: I am sorry.

Q (By Mr. Kulikowski) Is it 1946?

A It is 1946 or 1947. I am not sure of the year.

Q Have any other opinions been issued out of the solicitor's office since 1946 bearing on this same question?

A Not in the form of a solicitor's opinion, no, that's correct. The solicitor has expressed his views in other memorandum but not in an opinion of this nature to my [101] knowledge.

Q These expressions have been recent?

A Yes, as part of this recent review.

Q Do they coincide exactly with what was in this opinion of 1946?

A It's my understanding that the solicitor's office feels that the policy now in effect is in accordance with the laws on Indian Preference.

Q And you have never heard them express any doubt as to that?

THE COURT: Counsel, you have exhausted this subject. It doesn't matter whether the solicitor takes the position, any position on it as far as this case is concerned?

Q (By Mr. Kulikowski) Mr. Gunter, does the Indian Preference Policy apply to just Indians that live on reservations?

A No. It applies to any Indian who is a member of a tribe.

Q And it's not necessary that he reside on a reservation?

A He need not physically reside on the reservation but he must be a member of a tribe that's a federally-recognized tribe.

Q Mr. Gunter, earlier you testified as to the exceptions that can be made to the new Indian Preference Policy and that you had personal experience in working with these. How many of those have you viewed in performance of your [102] official duties, requests for exceptions to the policy to promote or to take action on a non-Indian?

A I can't give you an exact figure but it's approximately fifteen.

Q Do you know of any that have been granted?

A Yes. Now, of the fifteen, there are about seven or eight that are still under review. Those that were decided, there were actually three exceptions granted but one of them was a question over an initial appointment. There are only two relating to the subject of promotion. Now, since then one of those two have been reversed, that is to say that the Indian, the qualified Indian employee in one of the two cases with the exception where granted has been placed in the position. The other is currently under a grievance consideration.

Q But one of those was a reversal?

A Yes.

Q Who reversed the Commissioner?

A No, this was reversed by the Office of the Secretary.

Q Of Interior?

A Yes.

Q So is it fair to say that he reversed the Commissioner of Indian Affairs on his decision?

A That's correct.

Q Do you have any idea, based on your experience

in this [103] area, 'how long this procedure takes of applying for an exception and how long it takes for a review by the Commissioner before a decision is made?

A Right now it has been taking a little longer because we are somewhat disrupted in Washington, but it's been taking, I would judge, about anywhere from three to six weeks or two months.

Q Of this roughly fifteen number, I believe you said seven were still pending?

A Yes.

Q Mr. Gunter, you testified earlier in response to questions from Defendants' counsel that there was a policy of similar nature applying to promotion within the Indian Health Service, HEW, and that there were differences that existed between their policy applying to promotion and that applying to promotion in the BIA. I believe you used the words with respect to the Indian Health Service "all things being equal." Could you elaborate on that and state what you mean by "all things being equal"?

A Let me explain that I have, I am not sure that I have seen the most recent issuance from the Indian Health Service because I have heard their personnel people state it two different ways. The first way was the method that I mentioned earlier and that is that if two employees' [104] qualifications are relatively equal, the Indian would be given the preference to the job, and then there's another qualifying statement on that. Now, I heard more recently, about two weeks ago, other personnel people express it in this manner, that a qualified Indian would receive priority and consideration for a vacancy.

Q You drew a distinction between that and the Indians, the BIA promotion preference, and I believe you used the word that as long as the Indian is qualified, do you mean by this, minimum qualifications?

A I mean meet the qualifications of the position, that's correct.

Q Mr. Gunter, did you earlier hear the testimony of Mr. John Arkansas?

A Yes.

Q Most specifically with respect to his testifying that as long as qualified Indians were on the list, he didn't even consider the personnel files of non-Indians, is that consistent with what you understand the policy to give?

A If you can give me a minute, let me explain what has happened. There has been some confusion throughout the Bureau.

Q If you would be responsive to my question.

A I think I can be responsive in this manner. The wire, this was a teletype wire sent to the field on June 23rd [105] of this year, stated that if the policy, somewhat in this manner, if two people are qualified for a job and one is Indian, he shall receive preference for the job. There were no interim procedures attached to that at that point, and the reason for that is that we had to develop them.

About the middle of July we sent out a draft of a manual release for a review and consideration by management people, employee unions and employees, which stated as follows, and this is the policy that we ask that they use as guidelines until such time as the policy could be approved by the Department of the Interior, and that policy stated in this manner, that following determination as to whether both the Indian and the non-Indian people were qualified, the Indian people then would be and non-Indian people would be determined as to whether, we have two categories, Qualified and Highly Qualified, from the Highly Qualified the best qualified individuals are picked, and the draft of this particular manual release stated that a certificate would be issued which would contain the best qualified Indians and the best qualified non-Indians, and also the selecting officer would be provided the list of qualified Indians. And then they were told that if a non-Indian was selected, it had to be handled as an exception.

[106] That's the reason I think that perhaps there has been some confusion, because for that first beginning three weeks there, the only statement they had was that if an Indian was qualified he receives the preference.

Now, under this interim procedure that is in effect, they would consider the best qualified non-Indians. However, if there was a desire to select that individual and there existed either a best qualified Indian or qualified Indian, it would have to be handled as an exception.

MR. KULIKOWSKI: No further questions.

THE COURT: Can you answer counsel's question after the explanation with a yes or no answer? He asked you whether Mr. Arkansas's method of handling it was within the policy as you had issued it.

THE WITNESS: Well, as far as the interim guide since July 19th, it would not be. Prior to that he exercised his judgment, and I would have said it was proper.

THE COURT: It is within the scope?

THE WITNESS: Yes, sir.

MR. KULIKOWSKI: No further questions.

THE COURT: Mr. Gunter, you mentioned the application of the Preference Policy by other agencies or departments in a limited extent. Would you elaborate on that for us a bit?

THE WITNESS: Well, what I had reference to, Your [107] Honor, is that in Interior some other bureaus can make a very limited use of the Indian Preference if the work that they are performing is of direct benefit to tribes.

Now, to my knowledge, the other bureaus have hired only about twenty-five or thirty people. Now, this is by use of the hiring authority. It has nothing to do whatsoever with the Preference Policy, however. The Preference does not apply in those instances, and I think I may have confused people with my first answer. It is simply the appointing authority that is used there, not the Preference.

THE COURT: Thank you. Anything further, counsel?

MR. ORTEGA: The government has nothing further of Mr. Gunter.

MR. SHERMAN: I just have one question, Mr. Gunter.

RECROSS-EXAMINATION

BY MR. SHERMAN:

Q Have there been any instances thus far implementing this new Preference Policy promotion where a non-Indian who is better qualified than an Indian has been placed in a position? In other words, let me rephrase that. Has an Indian been promoted when his qualifications were not equal to a non-Indian who is also competing for the same vacancy?

A I can't answer that question. The cases that I am familiar with—well, I can't answer the question. [108] In all instances—let me back up just a second.

THE COURT: Well, I think you have answered the question. I think it would be best determined by the individual handling each case.

Any further questions of Mr. Gunter?

MR. KULIKOWSKI: None.

THE COURT: If not, he may be excused.

MR. ORTEGA: May he be permanently excused, Your Honor?

THE COURT: He can be permanently excused if he wishes.

Have you completed your case?

MR. KULIKOWSKI: Yes, Your Honor.

THE COURT: How much case, if any, do you have in addition, Mr. Ortega?

MR. ORTEGA: Your Honor, as far as the government is concerned, we are only going to introduce one exhibit. Mr. Gunter was brought here at the government's request. He was to be our witness. We have already elicited the information.

THE COURT: So you only have one exhibit. Go ahead.

Mr. Sherman, do you have any proof you want to put on?

MR. SHERMAN: Your Honor, we have no witness. I would, though, like to make a brief request of this Court relating to certain problems we have had with our

anticipated [109] witness who was supposed to appear today. If I may, could I do that at this moment?

THE COURT: Yes. Go ahead.

MR. SHERMAN: We had anticipated calling a Mr. Peter McDonald, who is the Chairman of the Navajo Nation. He very much wanted to attend today but unfortunately the opening session of the Tribal Council began today and he had to preside at that session.

Our entry into this case was on such late notice that we didn't know until yesterday that Mr. McDonald couldn't be present. We view his testimony as considerably important in this case because he was going to deal with certain issues such as the continuing problems that Indian people have now that were similar to the problems they had in 1934.

He was going to also testify as to his belief that the Bureau would be considerably more effective and responsive to the needs of Indian people if Indian participation increased, and he was going to go into several of the examples that he has had on his own reservation where the Bureau hasn't been responsive because of lack of Indian participation at the higher levels.

We view this testimony as important on the Constitutional issues.

In view of that I would like to make an unusual request, and that is that we would like leave to bring Mr. [110] McDonald back to this Court, either before the three-judge panel, or before one of you, and briefly have the chance to have him testify. I know this is an unusual request.

In the alternative, perhaps we could take his deposition with all counsel being present and give each counsel a chance to cross-examine the witness. I'm sorry about this, but our late entry into this case made it impossible to make other plans in view of his unavailability.

THE COURT: Perhaps you can work out with counsel a statement that can be, a deposition or whatever. We will consider it at a later date.

MR. SHERMAN: I appreciate that, Your Honor.

MR. ORTEGA: Your Honor.

THE COURT: Yes. Go ahead.

MR. ORTEGA: I have just this one exhibit. It is a certified copy of a memorandum with respect to the present status of the training issue.

THE COURT: Do you have any objection, counsel?

MR. KULIKOWSKI: None. We discussed it.

MR. ORTEGA: It is marked as Exhibit M. It's submitted to the Court to refute the mootness of the training issue.

Other than that, Your Honor, the government has no further evidence to present.

THE COURT: Counsel, I think we'll consider the [111] legal arguments on Brief. I think the Court would prefer to handle it that way.

As far as the deposition is concerned of Mr. McDonald, that should be taken quite soon, perhaps ten days, something of that order, and if the Plaintiffs feel that there is something developed during the course of that deposition, why, of course, they will be permitted to rebut it by leave of the Court only.

So at the conclusion of the deposition, if you feel compelled to put on some rebuttal testimony, make application to the Court for permission to submit that by way of deposition or in some other form.

MR. KULIKOWSKI: That is acceptable to Plaintiffs, Your Honor. We would like to urge it be done just as soon as possible because of the nature of the relief we are praying for.

THE COURT: Yes, we are anxious to get the case disposed of. Will you take the deposition within ten days?

MR. SHERMAN: I understand that the Tribal Session ends on December 8th and we will do it the following day.

THE COURT: Well, counsel can work it out between themselves as to the day. If you have any problem about the time you will have to ask the Court to change it.

Do you have any suggestion as to the time for the Briefs?

[112] MR. ORTEGA: Your Honor, the Government does wish to submit some additional Briefing on this in addition to what we have previously done, and in view of the pending deposition within ten days we would suggest at least twenty days, because that may have some bearing upon the manner in which the Brief is drafted.

THE COURT: Twenty days?

MR. KULIKOWSKI: A maximum of twenty days.

THE COURT: That the Briefs be submitted by both sides simultaneously twenty days from this day.

The case is submitted and the Court will be in recess.

(Whereupon, the Court stood in recess at 12:12 P.M.)

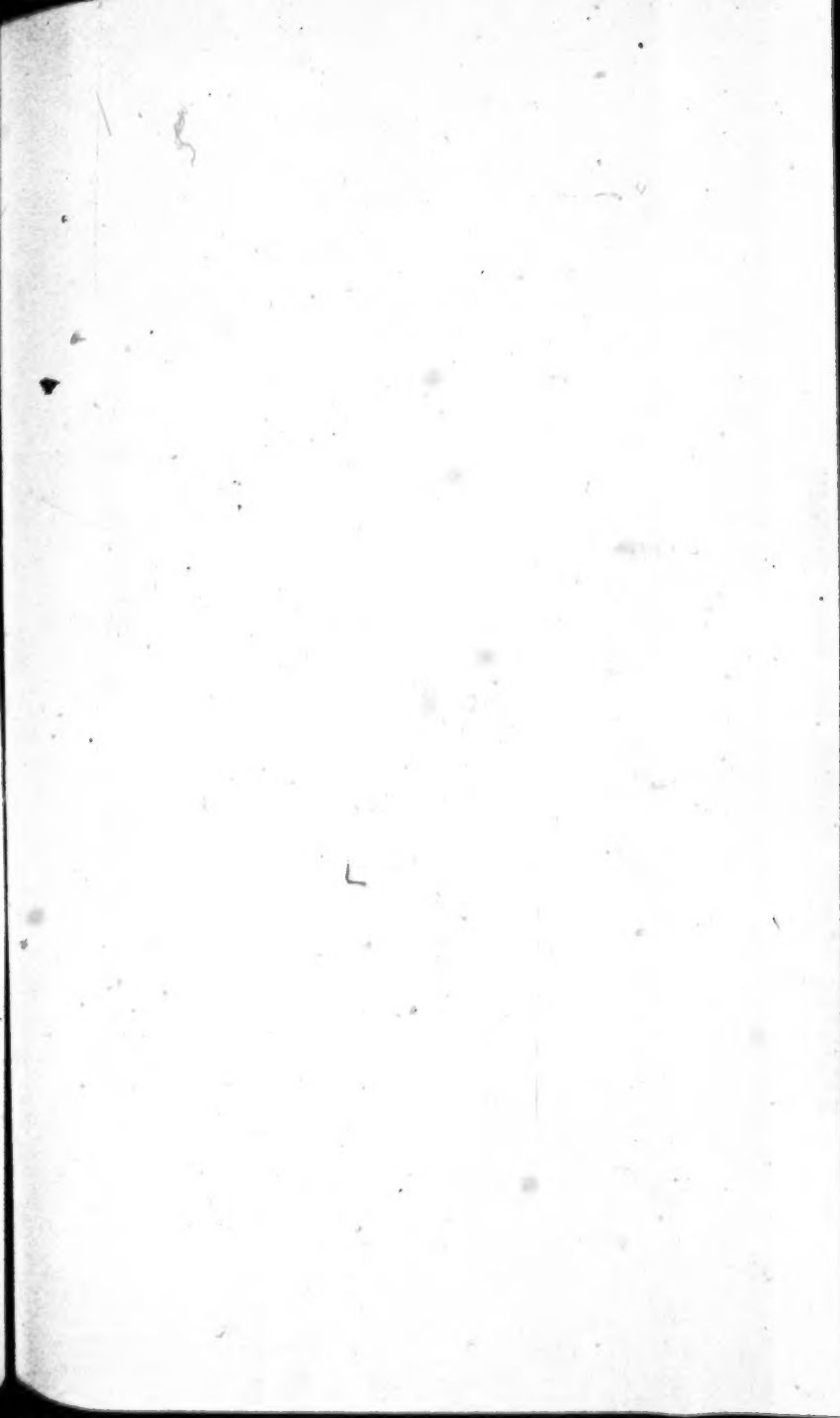
[113] REPORTER'S CERTIFICATE

I, Ada Dearnley, Official Court Reporter for the United States District Court, DO HEREBY CERTIFY that I reported pages 5 through 112, both inclusive, in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 9th day of July, 1973.

Official U.S. Court Reporter



Supreme Court of the United States

No. 73-364

Answerd,

Appellant,

v.

C. R. Mancari, et al.

**APPEAL from the United States District
Court for the District of New Mexico.**

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 73-362 and a total of one hour is allotted for oral argument.

February 25, 1974